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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1919—JANUARY TERM, 1920.

VOLUME CIV

HENRY P. STODDART,

OFFICIAL REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

JUSTICES

ANDREW M. MORRISSEY, Chief Justice
CHARLES B. LETTON, Associate Justice
WILLIAM B. ROSE, Associate Justice
SAMUEL H. SEDGWICK, Associate Justice[1]
ALBERT J. CORNISH, Associate Justice[2]
JAMES R. DEAN, Associate Justice
CHESTER H. ALDRICH, Associate Justice
GEORGE A. DAY, Associate Justice[3]
LEONARD A. FLANSBURG, Associate Justice[4]

COMMISSIONERS

WILLIAM C. DORSEY
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LEONARD A. FLANSBURG[5]
WILLIAM B. CAIN[6]

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John B. Barnes ..... Deputy Attorney General
Charles L. Dort ..... Assistant Attorney General
Mason Wheeler ..... Assistant Attorney General
Cecil F. Laverty ..... Assistant Attorney General
Henry P. Stoddart ..... Reporter
Harry C. Lindsay ..... Clerk
Philip F. Greene ..... Deputy Clerk

[1]December 25, 1919, Associate Justice Sedgwick died.
[2]April 18, 1920, Associate Justice Cornish died.
[3]Appointed January 8, 1920.
[4]Appointed April 21, 1920.
[5]Resigned April 21, 1920.
[6]Appointed June 1, 1920.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper	Pawnee City
Second ...	Cass, Otoe and Sarpy.	James T. Begley	Plattsmouth
Third	Lancaster.	Elliott J. Clements .. William M. Morning .. Frederick E. Shepherd Willard E. Stewart ..	Lincoln Lincoln Lincoln Lincoln
Fourth ...	Burt, Douglas and Washington.	L. B. Day.. ..... James M. Fitzgerald Charles A. Goss .... Charles Leslie ..... William A. Redick .... Willis G. Sears ..... Carroll O. Stauffer .... Alexander C. Troup .. Arthur C. Wakeley	Omaha Omaha Omaha Omaha Omaha Tekamah Oakland Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran .. Edward E. Good	York Wahoo
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button .. A. M. Post	Fremont Columbus
Seventh ..	Clay, Fillmore, Nuckolls, Saline and Thayer.	Ralph D. Brown	Crete
Eighth ...	Cedar, Dakota, Dixon and Thurston.	Guy T. Graves	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	William V. Allen .... Anson A. Welch	Madison Wayne
Tenth	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis W. Blackledge William A. Dilworth...	Red Cloud Holdrege
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edmund P. Clements Bayard H. Paine	Ord Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	J. Leonard Tewell	Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred ..	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover ..	Rushville
Seventeenth	Arthur, Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart	Gering
Eighteenth	Gage and Jefferson.	Leonard W. Colby ..	Beatrice

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IN MEMORIAM

SAMUEL H. SEDGWICK.

At the session of the Supreme Court of the State of Nebraska, March 1, 1920, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Albert J. Cornish, Honorable James R. Dean, Honorable Chester H. Aldrich, and Honorable George A. Day, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

In these commemorative proceedings, the committee have sought to avoid altogether merely conventional eulogy, and, in its stead, to place of record here a just and accurate estimate of the character and worth of Honorable Samuel H. Sedgwick, whose earthly career was brought to a close at his home in this city on December 25, 1919.

Judge Sedgwick was born at Bloomingdale, Illinois, in the year 1848. He was a law student at the University of Michigan from 1871 to 1872, and held a master's degree from Wheaton College, Illinois. In 1878 he went to York, Nebraska, where he practiced law until elected judge of the fifth judicial district in 1895, taking his seat January 4, 1896. He held this office for four years. In 1901 he was appointed a supreme court commissioner and served in that capacity about two years, when he was elected to the office which he held at the time of his death. He served as a member of this court continuously, with the exception of two years, for a period of fifteen years.

He was widely recognized as an able lawyer, entirely trustworthy and reliable in the business and affairs of his clients, and was ever honorable and just in his dealings with them and with his adversaries.

As a trial judge, he was industrious, prompt and unusually accurate in his conclusions, whether of law or fact. He had a frank, open way about him, and, because of his strength of mind and evident fairness, he was a power for right and justice, easily dominating the court in which he presided, and holding always the respect and confidence of both counsel and jury.

The reports of this court tell best of his worth as a judge; they tell of his industry and painstaking research. They are rich in demonstrative proof of his ability, sound judgment and accurate reasoning; of his lucid exposition, and of his admirable directness in reaching and stating conclusions.

As a citizen, the simplicity of his life, his sobriety of thought and conduct, the fairness of his dealings in all matters, his insistence upon integrity in private and public life, prove him a citizen of the highest and best type. His life was an inspiration to others, and his death, unforeshadowed, so calm, so devoid of pain, seemed but like the passing of a great soul from one tranquil state to another. His death was the end of a full and well spent life; he had kept good company; he communed much with the best philosophers and jurists of the present and past. He cherished no resentments; he was in harmony with the world. "His ways were ways of pleasantness; his paths were paths of peace." He drained life's goblet to the dregs and knew naught of its bitterness. And, now that he is gone, that he has passed beyond the bourne that divides the finite from the infinite, it is to us and to this court and to his bereaved family a source of deep consolation to know that he leaves behind him a judicial record unclouded and a character unstained.

We deplore the loss this court, this community, and the state have sustained in the death of Judge Sedgwick; and, to his family, in their sorrow, we tender our sincere sympathy.

We ask that this memorial be preserved in the permament records of this court and that a copy of it be furnished to Mrs. Sedgwick and her daughters.

JOHN J. SULLIVAN,
JACOB FAWCETT,
LESLIE G. HURD,
E. E. GOOD,
C. E. SANDALL.

JUDGE JACOB FAWCETT:

May It Please The Court: The report of the committee fairly and accurately outlines the life and work of our departed brother, Judge Sedgwick, but I feel I do not want to let this occasion pass without adding a word of personal tribute to this splendid man and judge.

In November, 1895, Judge Sedgwick and I were elected as district judges in our respective districts. At that time we were not acquainted. In 1897 I was called away from home to be gone a week, and Judge Sedgwick kindly consented to take charge of my docket during my absence. I met him for the first time on my return home. The members of the Omaha bar who had tried cases before him during the week of my absence all expressed themselves in unmeasured terms of commendation of the ability, fairness and promptness of Judge Sedgwick during the week he had been representing me.

In 1903 Judge Sedgwick was elected a member of this court, taking his seat in January, 1904. At the same time I became one of the supreme court commissioners to fill out the term for which Judge Barnes had been appointed. During that short term I became well acquainted with Judge Sedgwick. A warm friendship sprang up between us, which continued to the moment of his death. He retired from the court in January, 1908, and returned in January, 1910. For the six years following that day I was associated with him on this court. During those six years our friendship strengthened, and I came to know perfectly his devotion to his work, the care with which he examined, not only the cases assigned to him, but all cases submitted to the court. He was fearless and firm in his convictions. His associates sometimes thought that he

was a little more than firm. We at times chided him with being so, but this did not anger him. With a weak man it is a dangerous thing to be positive in his convictions, but with Judge Sedgwick the redeeming feature was that, while he reached positive convictions which it was sometimes difficult to get him to change, he was usually right. He was not alone, however, in his characteristic of firmness. Similar charges were sometimes made against other members of the court, myself included. I speak of this characteristic for the purpose of calling attention to the fact that firmness is not a fault in a supreme judge. It is far better to be firm, and occasionally be wrong, then it is to be vacillating and never sure of whether you are right or not.

The Judge was an honest man, of broad education, a good lawyer, an able judge, and a splendid citizen. His honesty was never questioned. What more can be said of a judge? He was an untiring worker. He desired to get at the bottom of every case that came before the court. He felt the responsibility resting upon judges of the court of last resort; a court from which there is no appeal, except in the very few cases coming before it in which a federal question might be involved. He realized fully the importance of being right in order that litigants in the last stages of their litigation might be sure of obtaining a careful examination of their cases and a correct application of the law thereto.

Judge Sedgwick was not only my associate for the years mentioned, but he was my personal friend. I honored and respected him in life. I shall ever cherish his memory in the years to come.

JUDGE LESLIE G. HURD:

May It Please The Court: May I ask the indulgence of the Court to add to the formal tribute of your committee my personal offering in affectionate memory of our brother, Samuel H. Sedgwick.

I first knew him at Wheaton College, when I was seventeen and he twenty years old, and from then for four

years was intimate with him and his family, and am indebted to him for many acts of friendly assistance in student days. The venerable father, Samuel Parker Sedgwick, and his estimable wife, two daughters, then graduates of the college, Miss Clara, later Carscadden, and Miss Emma, later Brown, and two brothers, David E., afterward a well known physician at York, and Theron E. Sedgwick ("Tim"), long editor of the Daily York Times, were the other members of the family still at home. The father, Dr. Sedgwick, was a man of unusual character and marked ability in his profession. He was author of a work upon family medicine, a copy of which, in my family, has been, by forty-eight years of use, greatly worn, and is still highly valued.

Born of such ancestors, and in such surroundings, it was foreordained that Samuel H. Sedgwick should be of note in the world and that the world would be better for his life in it. I think I can say with assurance that there was never a time from his sophomore year when he had other purpose than the study of the law, and, with his usual capacity for successful achievement, he made his studies and activities converge to that purpose. I was with him in visiting different law schools. We cut classes to hear cases of special interest in the circuit court in Dupage county. We went to the moot court in the old schoolhouse where "Elbert" Gary, now the head of the American Steel Corporation, was then preparing for his career. Consistently with this fixed purpose Sedgwick took his college degrees, and the law course at Ann Arbor, and, fully equipped, began his work, practicing for a short time in Illinois, and later in Depere, Wisconsin, and then, in 1878, is my recollection, came to Harvard, and almost decided to locate there with me, but, before deciding, he visited York, which was a dry town, while Harvard was wet, and, while at York, some lawyer intimated to him "that there was no room for another lawyer at York." I believe Sedgwick took that as a challenge. At any rate, he said, after some time given to consideration of the matter, "he believed he would make room there." and he did.

Resulting from that decision came with him to Nebraska a most estimable lady, his wife, and two sisters, efficient social workers, and their husbands, a physician one, the other, a minister of the gospel, and the two brothers before mentioned, every one a gain for the new state of Nebraska.

As a lawyer, none gave a client better service, and never was a client of his led into needless litigation that his counsel might gain thereby.

As a trial judge, the law was his guide, and no consideration but just and impartial administration thereof moved him. His court impressed all coming therein as a Temple of Justice. And his quick and accurate comprehension of the facts and the law applicable thereto made easy the labors of counsel appearing before him. I cannot recall his using the phrase "Substantial Justice," but his decisions proclaimed as his aim "Justice to All and Equality before the Law," and write him down a just and fearless judge.

As a justice of the supreme court, his colleagues upon the bench are more entitled to speak than I, but, can we not all of us recall opinions, especially dissenting opinions, that "made our hearts burn within us?" Can we doubt that the wonderful interpretation of the facts shown in his opinions in many cases will make them of lasting service? and his accurate analysis of the law be a guiding star over the sea of jurisprudence in years to come?

"That the good we do is buried with us" is not written of justices of the supreme court; as to them, the good is written on the tables of the law and shall ever be read of men.

Personally the members of the bar, and collectively the profession of the law, have suffered a loss. The memory of such a man is a gain to be cherished and preserved. To me, a comforting thought is, that he boldly stepped across the dark river with no lingering pains and with his mental vigor at his zenith. Truly a good and useful

life well finished, which may well be an inspiration to all men.

JUDGE EDWARD E. GOOD:

May It Please The Court: It was my good fortune to have had an extended acquaintance with the late Judge Sedgwick. Our acquaintance began nearly thirty years ago, and soon ripened into a close friendship that endured until he put aside the mantle of mortality. Our frequent meetings and intimate associations afforded an opportunity to form an accurate estimate of his qualities of heart and mind, and to know his real character and worth. I knew and observed him as citizen and friend, as lawyer and jurist.

Judge Sedgwick was endowed by nature with a superior intellect, which he cultivated by persistent, continuous study and serious reflection. He seldom, if ever, indulged in light or frivolous conduct or conversation. He did not know the language of those who indulged in small talk. His mind was always occupied by serious and weighty matters. To those who knew him but slightly he may have seemed cold, unsympathetic and austere, but not so to those who knew him well. While he was modest and unassuming, he was, to his intimate friends, a genial, whole-souled man; a veritable wellspring of helpful information and kindly suggestions, and was an inspiration to high ideals and right living.

As a citizen he had no divided allegiance. He knew but one flag and one country, and was ever foremost in supporting men and measures for the welfare of his country, state and community. He never indulged in any questionable or underhanded conduct, and, while he was charitable to the faults of others, he was intolerant of cant, hypocrisy and chicanery.

As a friend he was true and loyal, sympathetic and helpful. He never betrayed a confidence, and his word or promise needed no indorsement or guaranty. To those who knew him his simple word was all sufficient.

Early in life he adopted the law as a profession. He made the law his mistress and was ever devoted to her. By his tireless and energetic study of the law he came to possess a profound knowledge of it. His great knowledge of the law and his rugged honesty and high sense of honor made him a valuable counselor and one in whom a client could entrust his legal affairs and feel secure that his rights would be protected and safeguarded, and also feel an abiding faith that he would not be involved in useless or fruitless litigation.

The lawyers who practiced before Judge Sedgwick while he was on the district bench admired him for his wide knowledge of the law and his fearless and correct application of its principles. He presided with great dignity, and his absolute fairness and candor won the esteem of all. So highly did he stand in the estimation of lawyers and litigants that few appeals were taken from his decisions, and a reversal of his decision on appeal was indeed rare.

When he was called to the supreme court he came with a rich store of knowledge and ripe experience. As a justice of this Honorable Court he labored unceasingly; he never shirked a responsibility that was rightfully his; he was not content to dispose of any case along the lines of least resistance, but believed in going to the bottom of every case, and was satisfied only when he had mastered the case and found the very right of the controversy.

In my opinion no greater jurist has ever adorned the bench of this Honorable court than Samuel H. Sedgwick. No one has ever wielded a greater influence in this court while a member of it than he; none have made a deeper and more enduring impress on the jurisprudence of the state.

He was a kind and generous friend; an able, conscientious lawyer; an honest, fearless, upright judge. He is gone, but his influence for good will live for generations to come.

CHIEF JUSTICE ANDREW M. MORRISSEY:

The court is convened this morning to pay a last tribute to the memory of our late associate; but how vain it is to attempt to portray the worth of this man, who gave the major part of his mature manhood to the development of the jurisprudence of our state.

Though a prominent figure—a leader—for nearly two score years, his finest and best qualities were known only to those who were privileged to be closely associated with him. To the lawyers he was known as a profound jurist; to the people generally as a just and fearless judge; but the power of his intellect was known only to those who sat with him at the consultation table. Many are the opinions that bear his name, and they will help to light the judicial pathway so long as our jurisprudence endures. But they give no adequate account of the prodigious labor he performed. The lawyer of the future who turns the pages of the Nebraska Reports will little know how much of the very spirit of Judge Sedgwick is written into them. To every case that came to the court he gave the same painstaking care he bestowed upon the record when he wrote the opinion himself. He held himself responsible for the result of every decision, even to the phraseology in which rules of law for future guidance were announced. Nor were his wonderful powers of analysis, his compelling logic, and his high character, his only contributions to the court. He would be just; but justice he would administer with mercy. Quiet and reserved, almost to the point of austerity, the gentleness of his nature and the warmth of his friendship were known only to the few whose good fortune it was to know him in those intimate relations of life where the ermine was laid aside, and the man whom God made was permitted to function in his own way.

IN MEMORIAM

SILAS ALEXANDER HOLCOMB.

At the session of the Supreme Court of the State of Nebraska, September 20, 1920, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable James R. Dean, Honorable Chester H. Aldrich, Honorable Geo. A. Day, and Honorable Leonard A. Flansburg, Associate Justices, the following proceedings were had:

To The Honorable, The Suereme Court of Nebraska:

Your committee, appointed to prepare and submit a testimonial to the life and character of our late Silas Alexander Holcomb, at one time a member and chief justice of this court, respectfully present the following:

Silas Alexander Holcomb was born at Goshen, in the state of Indiana, on August 25, 1858. He obtained his education in the common schools of that state, and removed to the state of Nebraska about the year 1879. He settled at Broken Bow, in Custer county, where he studied law and was admitted to practice in the year 1882. In politics he was originally a democrat, but in the days of populism he embraced that faith.

He was elected judge of the twelfth judicial district, defeating Judge Francis G. Hamer for that office, and served the state in that capacity for four years. In 1894 he was elected governor of this state. He was once re-elected, and served as Governor for four years, with credit to himself and to the state. He was elected judge of the supreme court on the fusion ticket of the populists and democrats, and served the state in that capacity for six years, retiring from the bench on January 1, 1906. Under the former system of rotation Judge Holcomb was chief

justice of the court for the last two years of his service. After retiring from the bench, Judge Holcomb went back to Broken Bow and engaged in the practice of his profession until July, 1913, when he was appointed chairman of the state board of control, in which capacity he served the state until July, 1919, when he resigned his position on account of ill health, and removed to the State of Washington, where he died April 25, 1920.

For many of the last years of his life Judge Holcomb suffered from disease, and while he was mentally alert until his death, he was a physical wreck. In his prime and when he was in good health, he was a magnificent specimen of manhood, standing over six feet in height, and as straight as an arrow. In his last years he was so wrecked by disease that he was an object of pity to his friends, but by the exercise of his indomitable will and his keen mental faculties, he refused to acknowledge defeat, and bravely worked until death came to his relief.

Judge Holcomb was possessed of a rugged honesty of character. He always served the state with credit, and honor to himself, and he has left an example of good and faithful service, and of a well-spent life.

We recommend that this testimonial to our departed associate and once chief justice of this court be ordered spread upon the journal of the court, and that a copy, duly certified under the seal of the court, be sent to his daughters.

JOHN B. BARNES,
JOHN J. SULLIVAN,
W. D. OLDHAM,
ANDREW G. WOLFENBARGER,
H. M. SULLIVAN.

IN MEMORIAM.

JUDGE JAMES R. DEAN:

Not long ago I was commissioned by my associates to attend the funeral of Judge Silas Alexander Holcomb at Broken Bow. My home community then mourned the loss of a man who was, as the expression is currently used, both good and great. And our loss is shared by the entire state.

My acquaintance with Judge Holcomb began when I came to Nebraska, as a young lawyer, and settled in Broken Bow in the early nineties. He was then an established lawyer there. It has been my good fortune to enjoy his personal acquaintance and his friendship longer than any other person here present. Let me relate a coincidence. Shortly after my arrival at Broken Bow a member of the local bar courteously gave me a much appreciated "try out" by associating me with him in the trial of a case in the county court. The sole question involved was one of fact, namely, whether the plaintiff was an innocent holder of the note in suit. At the trial two lawyers were on each side, but only two participated in the argument, on the one side Judge Holcomb, on the other myself. So that in my first case in Nebraska we appeared as opposing counsel. About six years ago Judge Holcomb argued his last case in the supreme court. It happened that we were opposing counsel in that case and on appeal we so argued it here. When he was first nominated for a state office, at his request, I wrote for him an introduction to the people that appeared in the Omaha World-Herald and other papers of the time.

In 1891 the judge was elected to the district bench of the twelfth judicial district, then composed of Custer, Buffalo, Dawson, and Sherman counties. It was after he became district judge that I began to know and to appreciate him for his real worth. In personality and character he combined strength and gentleness, and, while he was impartial and rigorously just in his decisions, he

did not lose sight of the humanities. He could, and on occasion did, scathingly rebuke fraud and oppression, and particularly when the poor were the victims of the proud and arrogant. He was so big and brave and honest that, in the progress of a trial, he would reverse himself on the instant when he found that he was in error.

So marked was his ability as a trial judge that, in 1893, he was nominated on a fusion ticket as a candidate for judge of the supreme court. In the election that followed he was defeated by the republican nominee, Judge Harrison, of Grand Island. In 1894 he was nominated by the fusion forces for governor and was elected. In 1896 he was re-elected and was the war governor during the Spanish-American hostilities. In 1899 he was again nominated on the fusion ticket as a candidate for judge of the supreme court and was elected. His term began in 1900 and he served six years. At this election he defeated the distinguished jurist, Judge Manoah B. Reese, who had formerly been judge of the supreme court, and who, in later years, again became a valued member of the court.

Judge Holcomb is one, of only three men, who in the first 50 years of its history, has been governor and subsequently judge of the supreme court of Nebraska. It seldom falls to the lot of any man to be so signally honored; to be given opportunity so great for distinguished and useful service. And his name will be revered as one who measured up to his opportunity for public service. Office did not spoil this man. He grew under responsibilities.

But for the physical infirmity that was the result of close application to his labor as a judge of this court, it is generally believed that another door of opportunity for distinguished service would have opened to him. From time to time, in party councils, he was prominently mentioned for the position of United States senator. But this is the human side of the argument. There is another side. There is a Divinity that shapes the destiny of men and of worlds. Therewith must we be content. Notwithstanding his physical affliction, his mind was clear and

his will was unbroken so long as life lasted. He was never heard to complain.

About six years before the end came he was appointed to membership on the board of control. After an efficient service of five years, or thereabouts, his illness became so pronounced that he resigned. So that his distinguished service for the state extended over a period of more than 17 years.

Judge Holcomb was a man of deep religious conviction. But I am sure that few persons ever heard him discourse on religious topics. No need for him to so discourse. His was a religion that was attested day by day. His name will endure. His fame, it is secure. It is well with him.

CHIEF JUSTICE ANDREW M. MORRISSEY:

Judge Holcomb came into public life at a time when political prejudice was strong, and the political contests through which he passed were marked by intense party spirit. But so well did he acquit himself in the office of governor that many of those who most strongly opposed his political policies became his warm friends. His dignity, candor and inherent honesty challenged the admiration of the people. His subsequent election to this court opened a new field of activity, and again he showed those qualities of heart and mind that had made his conduct of the Governor's office so successful. Studious, conscientious and upright, he helped to maintain the high standard of the Bench and inspired in the public mind respect for our jurisprudence.

IN MEMORIAM

ALBERT J. CORNISH.

At the session of the Supreme Court of the State of Nebraska, September 20, 1920, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable James R. Dean, Honorable, Chester H. Aldrich, Honorable George A. Day, and Honorable Leonard A. Flansburg, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

Your committee to draft resolutions in commemoration of the life and services of the late Honorable Albert J. Cornish, report:

Albert J. Cornish was born December 10, A. D. 1856. He graduated from Iowa State Law School in 1879; took post graduate course at Harvard; was admitted to the bar March, 1881; was elected district judge of Lancaster county, Nebraska, in November, 1895; served as district judge continuously until January, 1917, when he became a member of this court and served until the date of his death. Judge Cornish died Sunday, April 18, 1920.

During his long service upon the district bench he displayed rare ability. His instructions to the jury were models. His grasp of principles, his almost intuitive sense in discerning the truth, his nature and temperament, made him conspicuously strong in the trial of equity causes. He was integrity personified. No lawyer, nor litigant, ever questioned his honesty, sincerity, or ability. His valuable service upon the bench is an enduring monument to his memory. Throughout his long judicial career he was universally recognized as an able, honest, faithful judge. His opinions are embellished with conciseness

of statement and legal lore, giving him high rank as an able jurist. He was, in a broad sense, a refined, profound scholar and thinker, with wide range of general information and culture. His friends are legion. He had no enemies. He was always affable and courteous. He took an active interest in all public questions and had an extensive knowledge of public men and measures. He was free from blind partisanship; was one hundred per cent. American; made no compromise with any doctrine that contravened any cardinal tenet of the Republic. During his whole career he was free from any attempt at display or appeal for popular applause No self-adulation ever marred his exalted standing. Modesty and simplicity of manner and style were his characteristic virtues. He loved and was sincerely devoted to his family and home.

THEREFORE, BE IT RESOLVED:

That, in the death of Judge Cornish, the State of Nebraska has lost one of her most valued and esteemed citizens; this Court an honored and highly-valued judge:

That we shall ever cherish and emulate his noble example:

That for years to come, we who are privileged to remain on this side of the Great Divide, when we assemble in social concourse, will speak his name, recall incidents from his beautiful life, will be happier, nobler, and better because he dwelt among us:

That ultimately we shall renew his acquaintance in that broader, higher, better field of activity, when mortal puts on immortality.

That these resolutions be made a permanent record in this court and a copy furnished the family.

WILLIAM E. STEWART,
F. M. HALL,
A. C. WAKELEY,
W. F. GURLEY,
T. J. DOYLE,
H. H. WILSON.

JUDGE WILLARD E. STEWART:

May It Please The Court: A few short months have passed since the Honorable Albert J. Cornish was sitting on this bench, with your Honors, engaged in the performance of his duties as a member of this Court. It is fitting that this morning hour be spent in listening to a word of eulogy upon the life and character of this distinguished man.

At the age of sixty-four years Judge Cornish died on April 18th, 1920, a few moments after having served as an honorary pall-bearer at the funeral of Edwin C. Strode, a prominent member of this bar. His was a noble life, worthily ended. He fell asleep without a word of warning. His sun suddenly set while he was yet in the noon-day light of his useful life, only to rise again in the Great Hereafter more effulgent than before. No life closes without sadness, and his going leaves in this community a genuine, universal feeling of regret. Every one of his close friends will agree that his life was always happy. Those who stood near him, familiar with the story of his daily walk, can testify to his many alluring and enduring traits, which endeared him to his family, his friends, and his fellow citizens of this state.

It takes but little imagination to recall the real Judge Cornish, as we knew him: The memory of his pleasant smile, his cheerful greeting and his genial personality will ever recur to remind us of the loss of a valued friend. What is it to which this affectionate remembrance attaches? It is not only the recollection of his scholarly intellectual attainments, his social and official station, but the memory of his beautiful devotion to his loved ones, the magnetism of his gentle, kindly, lovable goodness, his reverence for the humble, simple virtues, his delicate sense of honor, and his plain, well-balanced common sense.

Judge Cornish served his state in the 23d session of the legislature, and upon the bench of the district and supreme courts, respectively, for over a quarter of a century. As a jurist he must be assigned a very high rank

among the illustrious and imperishable names upon the canvas of Nebraska's judicial history. Nothing discloses the real character of a judge of a court like the use of power. If he were ever in error as a judge, it was on the side of mercy. In his labors upon the bench he was lenient, patient, thoughtful, industrious and sound in judgment. He seemed to have an instinct for what was right, and had no fear except that justice might miscarry through fault of his. He believed that the first duty of every citizen was obedience to the laws of our country; that of the lawyer to nourish a wholesome respect for law, and of the courts to faithfully and impartially construe and administer the law in the promotion of equal and exact justice.

HONORABLE FRANK M. HALL:

Albert J. Cornish was born December 10, 1856. He attended school at Tabor College, Iowa; Cornell University, New York; graduated at the Iowa City Law School in 1879; and afterwards took a post-graduate course in the Harvard Law School. He commenced the practice of law in this city in 1881, where he continued to reside until his death. He was elected to the lower house of the Legislature of this state in 1891, and again in 1893, where he served with credit and distinction to himself and his state. He was elected district judge, the first time, in November, 1895, and was re-elected from time to time, and continued to serve as district judge until about the first of January, 1917, having been elected to the supreme court in November, 1916. He had served as a member of that court a little over three years and three months, when he was suddenly called to the Great Beyond.

His work here among us is finished, but we hope and believe that his work will continue where it left off here, and that the life here was but a preparation for the life beyond the grave.

Judge Cornish had an impressive manner both of action and speech. What he said usually carried conviction, because of its sincerity, candor, fairness, and moderation.

He was a man of broad, generous mold; was never narrow, dogmatic nor partisan in his views, and this added force and conviction to his utterances.

He was not what you would call a clear-cut, direct and forceful man; he rather reached his conclusion in a roundabout, argumentative way, examining each step as he proceeded with great caution and care, apparently feeling his way as he advanced with unerring certainty to a final and correct conclusion. His mental processes were most original and unusual. He was of the persuasive order, gentle, insinuating and convincing by the manner, moderation and fairness of his statements. He never reached any particular eminence at the bar as a practitioner. He attracted no particular attention, as I recall it, as a trial lawyer or an advocate. I am of the opinion now that the general practice of law was not particularly attractive to him, and made no particular appeal to him. He was really at his best and his strong qualities appeared to better advantage on the bench, than as a practitioner.

On the other hand, however, he was not what might be called an ideal trial judge, because he was wholly lacking in executive ability. He had no idea of expediting and dispatching business. He was nothing of a disciplinarian; his mind did not seem to run in this direction or along these lines. He was not suited by nature or temperament for a good trial judge, and yet his work gave, I dare say, almost, if not quite, universal satisfaction, because of his integrity and sincerity, and because everybody was convinced that he was honest in trying to do his duty as he saw and understood it; so that, notwithstanding what might be deemed his faults as a district judge, he was highly satisfactory, and all the lawyers of the bar really loved Judge Cornish, and thoroughly believed in him; and so, in spite of his lack of executive ability and of putting push and go into the trial of cases, his other qualities so far overbalanced these shortcomings, if shortcomings they can be called, that he left the trial bench with universal regret among the lawyers of the Lancaster county bar.

He was very much better fitted by nature, temperament and makeup for the supreme bench than he was for the trial bench, and in the latter position was at his best; and if he could have remained upon the supreme bench of this state for a period of years, he would have made for himself a high and enviable name as one of the supreme judges of this state, because he possessed in an eminent degree those particular qualities of both head and heart that are required to make a great judge. He seemed at sixty-four years of age in the very prime of his intellectual vigor and manhood, and was splendidly equipped and ready to do his most mature and valuable work as a supreme judge for the State of Nebraska.

He had a high and proper appreciation of the responsibility, the nobility, and the dignity and importance of that great position. He fully realized that the due and orderly administration of justice was the most important and august work given to man on this earth, and that whoever labors in that great field with distinction and ability makes an invaluable and lasting contribution to the elevation of all mankind and the social betterment of the world. It is, therefore, a matter of the most serious moment that a judge of the highest court of the state and nation should first have a proper conception and appreciation of the duties, obligations and responsibilities of that great office. The lawyers understand this better, perhaps, than any other class of people. The duty of the lawyer is, therefore, correspondingly increased to constantly labor for the strengthening, improving, elevating and ennobling of our judiciary.

The gravity of this subject is emphasized at the present time, when we have evidence on every hand of an apparently growing distrust among our people of the law and of our judicial system.

Judge Cornish fully appreciated the fact that the very foundation stones of this republic, as of all republics, is respect for and obedience to the law. No one has stated this obligation more strongly than Abraham Lincoln when he said:

"Let reverence for the law be breathed by every American mother to the babe that prattles on her lap; let it be taught in the schools and colleges; let it be preached from the pulpit, proclaimed in legislative halls and enforced in courts of justice; and in short, let it become the political religion of the nation, and let the old and the young, the rich and the poor, the grave and the gay, of all sexes, tongues, colors and conditions, sacrifice unceasingly upon its alter."

Judge Cornish was of heroic mold, both mentally and physically. He held to his convictions with a tenacity that was admirable. No amount of opposition could ever shake him. He held to his belief in the single tax theory as a solvent for many of our economic ills, against the ridicule and argument of all his friends for years and years, without a single supporter that I ever heard of. No amount of argument ever made the slightest impression upon him. I could mention many other illustrations, but this will suffice.

The place of Judge Cornish in the community will not be easily filled. The influence of his life and character among us will not be soon forgotten. His cordial manner, genial smile, and kindly nature will be remembered, and we shall continue to respect and revere his memory. He was a tender and loving husband, a kind and indulgent father; he found his chief pleasure, recreation and entertainment in his family circle and books. While he has gone from among us, he has left behind for our instruction a lesson of a beautiful, well-spent, sympathetic life of service and devotion to his country. His sun went down on the evening of his well-spent life, to rise again in the radiant light of a new morn.

HONORABLE HENRY H. WILSON:

May It Please Your Honors: I wish to bear testimony to the splendid qualities of Judge Cornish. He was an able and courageous judge, a rugged and independent thinker, and a genial and lovable personality. During my

forty years of practice I tried more cases before Judge Cornish than before any other judge. I never doubted that in his decisions I got his real opinions. These decisions were not always right, because he was human, but that he believed them to be right was never questioned.

He possessed in a marked degree the judicial faculty. He was open-minded, and a case in his court was always debatable as long as the record was within his control. He had no pride of opinion, and was ever ready to reverse himself when convinced that he was wrong. He was especially strong in the trial of equity cases, where he was called upon to pass upon the facts as well as upon the law. His findings of fact were seldom disturbed by this court.

Judge Cornish always took a friendly interest in the younger members of the Bar and often gave them useful suggestions and kindly hints in their practice before him. No young man before Judge Cornish was ever overawed by the eminence of his opponent, and always had a patient and sympathetic hearing. Scores of young men will remember Judge Cornish with gratitude for his kind treatment of them when they were beginners at the bar.

The judge was a great reader and an independent thinker. He was a political philosopher. Neither party traditions nor party platforms could bind his mind, condition his thinking or control his teachings. That he might find himself quite alone in his opinions did not disturb him in the least. Yet the expression of his opinions was so mild and considerate, his manner was so kindly and thoughtful of others, that even his sometimes extreme opinions provoked no personal hostility.

He had unbounded faith in his fellow men and was always optimistic as to the future of the race.

Judge Cornish was by nature most kind and considerate of others, and during the thirty-nine years of our acquaintance I do not recall a harsh remark or a bitter comment falling from his lips. He was a most interesting and congenial companion and possessed a most likable personality.

HONORABLE THOMAS J. DOYLE:

Judge Cornish was unique. In him was blended in beautiful proportions America's true conception of nobility; sociability to almost childlike gentleness—nothing forbidding. He had the faculty of making the most unsophisticated feel they were leading the conversation, furnishing the ideas upon which depended the future weal or woe of mankind. Then, following Pope's rule "Men must be taught as if you taught them not, and things unknown proposed as things forgot," exposing fallacies, substituting higher principles, sounder theories, imparting information from his well-stored mind, making the listener feel that he still occupied the center of the stage. If a stranger, when the conversation ended he departed feeling he had made a new friend whose friendship was worth while. If an old friend, if an old acquaintance, there had been added new bonds of friendship.

He was a noble exemplar of that higher life, adding to the joys of life for all that wide circle privileged to claim him as friend.

This presence, these ceremonies here, the scene of his final labors, dignified and graced by his presence, cause us to almost feel his living presence; witness the greeting of his welcoming smile; hear words of wisdom uttered by his gentle voice.

For twenty years I practiced law in his court. I never saw him ill-natured. His mental processes were his own; his reasoning faculties finely developed. He sought controversy for sake of arriving at truth. He quickly discerned fallacy. He was magnanimous in acknowledging any error as to premise or conclusion in his own statements. He was patient to a fault. With him, to settle a controversy aright was more important than expedition. He was sometimes criticized for devoting too much time to the trial of a lawsuit. To my mind this was a virtue, rather than a fault. Long experience taught him in legal controversies were interwoven truth and fiction; that collateral views cast a flood of light on the main issue. He knew many an honest man had been defeated by an

incompetent jurist holding competent testimony incompetent. As Chancellor, his policy was to hear all the evidence offered, unless obviously wide the mark; as Judge in the law court, to receive whispered purpose of offered evidence, and admit it if it had any bearing upon the question at issue. His guiding star was Justice. He was a great jurist, a benefactor to mankind. He will be cherished in fondest memory by the bench and bar of this state, so long as those who knew him remain on the stage of being.

I like to think of Judge Cornish in his admirable social qualities. An hour in social concourse was never spent with him without lasting benefit. He took a keen interest in the current topics. He made an intricate study of men and measures. The conversation would take a wide range —literature, politics, history, philosophy. He was familiar with the teachings of Huxley, Herbert, Spencer, Darwin; recognized the great intellectual strength of each; also some of their fallacies. He formed his own conclusions, then was anxious to know if his conclusions were identical with those of other minds. Thus he sought the opinions of men in all walks of life. He frequently consulted the wisdom of his bailiff, the janitors, farmers, lawyers, doctors, divines—anybody, everybody, the interested and disinterested parties. He roamed about in an atmosphere of intellectual freedom, seeking wisdom from every source. He would disagree with you so politely, gently, you would feel he was half persuaded.

He was at his best in the sacred environment of home. Down on the floor or on the lawn playing leapfrog with the boys. Here he was a boy again, animated with all the exuberance of youth, casting aside the dignity of the bench, relaxing into that higher, nobler state, when man lives just as God made him. What an influence for good! Leaving an ineffaceable imprint upon the character of his children.

The same qualities made the young members of the bar love him. If he ever committed a breach of ethics, it was some kindly suggestion to the young lawyer as to an

additional fact to develop, or a dangerous pit to stay away from.

The man who knew Judge Cornish and did not love him does not function normally.

God bless you, Judge, we all loved you. We miss you. You are a big loss to this community. Your influence lives and shall continue to mould and guide men. If, in that progression beyond the tomb, good works avail, you are way up among the Celestials.

In the words of a great American poet,—

"Were a star quenched on high,
For ages would its light,
Still traveling downward from the sky,
Shine on our mortal sight.
So when a great man dies,
For years beyond our ken,
The light he leaves behind him lies
Upon the paths of men."

JUDGE ARTHUR C. WAKELEY:

May It Please Your Honors and Gentlemen of the Bar: My friendship with Judge Cornish commenced in the days when we were fellow students at Cornell University. His cousin, Judge A. S. Tibbets, so well remembered in this county, was also in the University, although in a class preceding ours. We were in the morn and liquid dew of youth. The college campus, poised above the shores of Cayuga Lake, was the boundary of our little world. From college windows, university life presented to us the microcosm—the world in miniature; not yet for us the macrocosm—the great world outside.

In the cloistered quiet of these academic halls, from minds like those of Andrew D. White, then president of the university, of Bayard Taylor, and Goldwin Smith, and others, occasional lecturers, Judge Cornish absorbed that love of learning and of literature reflected in the activities of his professional life.

Afterwards, tempting fortune in this capital city, as a *nisi prius* judge for many years, he deflected the conflicting currents of litigation into the common channel of justice as it was revealed to him; and his elevation, at last, to a seat beside Your Honors, attested the esteem of his fellow citizens. The work of the judge is not spectacular. It is accomplished, as your Honors know, only by exacting and unremitting labor; not in the public gaze, but rather in the enforced seclusion of study; but work responsive, however, only to the dictates of your approving conscience. This still small voice was always audible to Judge Cornish. In every vicissitude of the case, he sought the reason, the philosophy, the justice of the law. He discarded technicalities. He attached not too much importance to precedent and made all bend to the very right of the case.

He had travelled much. He was well read on social and economic questions. The great poets, Shakespeare, Tennyson, Byron, and the others, were familiar to him. Emerson was perhaps, his favorite author. It is said, Your Honors, that those who listened to Lord Chatham felt that there was something finer in the man than anything that he had said. So with our friend. I sit again beside him. I forget the lawyer and the judge. I forget the honors he had earned. I see his friendly smile. I feel the glow of his companionship. I find in his conversation, consideration for all. I feel the promptings of a heart as gentle as any woman ever had, and I know that I stand before one whose transparent honesty, whose solicitude to do right, and whose innate nobility of soul reassures my faith in human kind.

The influence of a good man's life—the life that Judge Cornish led—is one of those imponderable assets we cannot weigh, but it is ever present. As I look about these walls, and see pictured here the faces and the lineaments of those who like your Honors, have labored in this temple, I feel sure that their benisons still rest upon this commonwealth. For we are the heirs of all these noble spirits that have gone before. Whether we realize it or not, the

lives of all of us reach backward and appropriate out of those that have preceded ours, something of their inspiration, something of their beneficence.

The flowers we placed upon his grave have long since withered; resolved, perhaps, into the elemental dust from which they blossomed forth; but the stainless record he has bequeathed will exhale a perfume and an incense which the passing years will never dissipate. He followed Emerson's advice. He hitched his wagon to a star; "and by the vision splendid was on his way attended." In life's varied round, he listened for the touches of sweet harmony.

"Such harmony is in immortal souls;
But, whilst this muddy vesture of decay
Doth grossly close it in, we cannot hear it."

I believes that he hears it now.

JUDGE LEONARD A. FLANSBURG:

I feel that I cannot let this occasion pass without saying a few words. My acquaintance with Judge Cornish began when I first entered the practice. It was an acquaintance that immediately sprang into friendship. I presume every young lawyer felt as I did toward him. He was the friend of the young lawyer. His patience, fairness and great kindliness made it easy for the beginners in his court. He was always ready to hear the young attorney and would enter into a full discussion with him. I have heard it said that he never, himself, argued questions of law, but only discussed them. It seems to me that was largely true. What he had to say seemed rather in an attempt to develop the truth for himself than to convince others. Judge Cornish was preeminently fair. He believed in deciding upon principles of law, rather than in attempting to warp principles of law to bring about desired results. In the discussion of questions of law, I have many times heard him question himself aloud as to whether the principle of law urged would be fair. I have heard him say that he had known judges who could ride

right through a contract or a statute in order to do what seemed to that judge to be justice. He regretted to see that in a judge. His one overmastering purpose and idea seemed to be justice administered through the processes of the law.

I would feel like an ingrate were I not at this time to say something of the personal interest and kindness that he showed me. It was through his desire that I received appointment to the supreme court commission, and, when I took that appointment and left the district bench, Judge Cornish told me that he expected to resign before his term was up, and that he hoped that I could then be appointed to the supreme court. Though he was carried away and our plan itself failed, still I feel that I owe my position here to what he did for me in his lifetime.

The bench and bar have sustained a great loss in the death of Judge Cornish, but the example of his high character as a man and as a jurist will ever be an inspiration to those who knew him.

CHIEF JUSTICE ANDREW M. MORRISSEY:

There was an indefinable quality in Judge Cornish that endeared him to his associates. It cannot be described; it can only be felt. He had a spirit of Democracy about him such as must have inspired Jefferson to write the Declaration of Independence. He was opposed to sham and pretense and autocracy in any form. His baby lullaby might well have been "A man's a man for a' that and a' that." With a deep sense of personal loss in his going I can do no better than to express my full concurrence in what has been said of him this morning.

During the period covered by these reports, in addition to the cases reported in this volume, there were 16 cases affirmed by the court without opinion, and 113 cases disposed of by the supreme court commission.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1919.

BEE PUBLISHING COMPANY v. STATE OF NEBRASKA.
VICTOR ROSEWATER v. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. NOS. 21314, 21315.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. Ruling on Stipulation. *Stipulation allowed in part.*

Rosewater, Cotner & Peasinger and *W. J. Connell,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *A. V. Shotwell, contra.*

PER CURIAM.

A stipulation of the parties has been filed in *Bee Publishing Co. v. State* (No. 21314), and also in *Rosewater v.* State (No. 21315), that the bill of exceptions settled in one of these cases may be filed and used by this court in the determination of both cases, and we are asked to make an order to that effect.

The bill of exceptions must be settled in the district court under section 7880, Rev. St. 1913, and "must be signed by the judge with his certificate to the effect that the same is allowed." The parties cannot stipulate as to the rulings of the trial court and then predicate error thereon. Those rulings can only be shown by the record, and, if they relate to the evidence, the evidence and the ruling complained of must be presented to the trial court

and certified to by him, or by the clerk in certain cases where the judge cannot act. This has been frequently decided by this court. *Murphy v. Warren & Co.*, 55 Neb. 220. In that case the law is stated in the syllabus: "Solely by stipulation, a bill of exceptions in one case cannot be made a part of the record of another case, even though the two cases be between the same parties." The certified record of the trial in each case must be filed in this court. That is jurisdictional.

It follows that a bill of exceptions allowed by the trial judge in one case cannot be received as the bill of exceptions in another case, unless it is also duly certified by the trial judge as such.

The stipulation that the two cases "be consolidated for hearing in the supreme court, and that said causes be heard in said court as one case" and that "briefs filed by counsel on behalf of either party shall be made applicable to and include both cases, and separate briefs need not be filed in each case," is sustained, and the two cases may be presented accordingly.

STIPULATION ALLOWED IN PART.

HARRY E. LEMER ET AL., APPELLEES, V. STEVE HUNYAK ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. No. 20664.

1. **Replevin: APPEAL: TRIAL DE NOVO.** An action of replevin is in part a proceeding *in rem*, and an appeal from an inferior court having jurisdiction of the subject-matter authorizes the district court to try the case *de novo* as if it had been originally instituted in that court.
2. ———: ———: **DISMISSAL.** Plaintiff in a replevin suit prosecuted an appeal from a judgment rendered against him in the county court, and procured an order from the district court taking the property from defendant, in whose possession it was when the appeal was lodged, and delivering it to plaintiff. After thus bringing himself and the property within the jurisdiction of the district court, it was error to permit him to dismiss his appeal and deny defendant an opportunity to have the issues tried in that court.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Piatti & Wear, John F. Moriarty and *Bernard McNeny,* for appellants.

Smith, Schall & Howell, contra.

MORRISSEY, C. J.

Plaintiff Lemer brought replevin against defendants for some hogs and other personalty and obtained possession of the property under his writ. On trial, the county court found in favor of defendants, and gave judgment against Lemer and one Pollack, who had intervened, for a return of the property or a recovery of its value fixed at $1,000. On the tenth day after the entry of the judgment, defendants had execution issued and were restored to possession of the hogs. On the same day, presumably after this restitution, Pollack filed an appeal bond, and a few days later procured a mandatory injunction from the district court annulling the execution issued by the county court and effecting a retaking of the property. Six weeks thereafter, defendants moved to require the filing of a petition under the appeal. No petition was filed, but more than four months later Pollack and Lemer entered a dismissal of the appeal, which the district court allowed. From the order allowing this dismissal, defendants appeal.

The question is whether a party who has obtained possession of personalty under a writ of replevin and, after failing to establish his right in the county court, has appealed to the district court may, as a matter of right, in all cases, dismiss his appeal so as to prevent a trial of the issues in that court.

Plaintiff and intervener rely upon section 8457, Rev. St. 1913, and the rule in *Eden Musee Co. v. Yohe,* 37 Neb. 452, that "a party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury." De-

fendants contend that this rule is inapplicable to actions of replevin; that, where the district court has obtained jurisdiction over the property and over the parties, it should retain the cause so as to do complete justice between the parties; that in this case a dismissal should not have been allowed without giving defendants an opportunity to show the value of the property in the district court.

An action of replevin is in part a proceeding *in rem*, and an appeal from an inferior court having jurisdiction of the subject-matter authorizes the district court to try the case *de novo* as if it had been originally instituted in that court. *Bates & Co. v. Stanley*, 51 Neb. 252, 259. Not only does it have the authority, but it is the duty of the district court to decide the case so as to do complete justice between the parties, even to allowing defendant to recover for an increase in the value of the property pending the appeal. *Deck v. Smith*, 12 Neb. 389.

Where the plaintiff prosecutes an appeal from the judgment rendered against him in the county court, and by means of the appeal is enabled to repossess himself of the property, he cannot be allowed to escape the force and operation of these rules by an arbitrary dismissal of the appeal. It is the duty of the court, before allowing a dismissal of the appeal, to give defendant an opportunity to establish his right to the property in that court, and, in case it cannot be had, to a money judgment for its value.

Plaintiff contends that the effect of this rule will be to give defendant the advantage of overthrowing a judgment from which he has not appealed. Perhaps so. But we fail to see how such proceeding can result in any injustice to plaintiff. If he has disposed of the property, no possibility should be left him to profit by the conversion, and, if he has not disposed of it, he is in a position to protect himself by a return of the property.

The judgment is reversed and the cause remanded.

REVERSED.

LETTON and CORNISH, JJ., dissenting.

Being of the opinion that an appeal in a replevin case is governed by the same rules as other appeals, and that if the defendant was not satisfied with the judgment in the lower court, and desired a review, he should have taken a cross-appeal, we dissent from the conclusion reached.

JOHN ROBERT FRANCIS v. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21004.

1. **Indictment and Information:** VARIANCE. An immaterial variance between the complaint on which defendant was given a preliminary hearing and the information filed is not sufficient basis for a motion to quash the information.
2. **Homicide:** MURDER IN FIRST DEGREE. Where a party, discovered in the act of burglarizing a building, attempts to escape, and, in furtherance of such attempt, shoots and kills another, such killing may constitute murder in the first degree under section 8581, Rev. St. 1913, although the killing may not occur at the site of the burglary.
3. **Criminal Law:** INSTRUCTIONS. Instruction No. 12, when read in connection with the other instructions given, *held* free from error.
4. ———: ———. A judgment of conviction will not be set aside merely for the giving of an instruction which, because of apparent errors in phraseology, is rendered meaningless, when the other instructions given constitute a clear and correct exposition of the law applicable to the case, and no prejudice to defendant appears.
5. **Homicide:** PREMEDITATION. No special period of time for premeditation and deliberation is required in order to constitute the unlawful taking of human life murder in the first degree.
6. ———: EVIDENCE: SUFFICIENCY. Evidence outlined in the opinion *held* sufficient to sustain the verdict.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Ralph P. Wilson, contra.*

MORRISSEY, C. J.

From a verdict of guilty of murder in the first degree and a sentence to imprisonment in the penitentiary for life, for the killing of Harold C. Crownover, defendant prosecutes error to this court.

The information is in three counts. The first makes the ordinary charge of murder. The second alleges that the murder was committed while defendant was engaged in the perpetration of, or attempt to perpetrate, the burglary of a storehouse owned by one Ankeny, and the third is like unto the second, except that the storehouse alleged to have been burglarized was owned by one Hoile.

In the night season, June 14, 1918, burglars were discovered in one of the store buildings mentioned in the information, in the city of Laurel. The city marshal and other citizens were notified and steps were taken to apprehend the burglars. The latter escaped from the building, made their way to an automobile which they had left in the city park, and drove rapidly out of the city, pursued by the city marshal and four citizens who had undertaken to assist in effecting a capture of the burglars. After the burglars had driven something less than a mile, closely followed by the car in which the marshal and his party were riding, they turned slightly to one side of the road and stopped. The pursuers drove up and stopped their car within a few feet of the car occupied by the burglars. The marshal gave an order to halt, whereupon the burglars opened fire on him and his party. Harold C. Crownover was shot through the head and died almost instantly. Dr. Sackett, the driver of the car, was mortally wounded, and another member of the party was shot through the arm. The burglars made their escape, for the time being, but were subsequently apprehended, both being found wounded. The evidence is amply sufficient to show that defendant was one of the party engaged in the battle with the marshal.

Defendant filed a motion to quash, alleging that the information varied materially from the original complaint on which preliminary hearing was had. The motion was overruled, and this ruling is assigned as error. The only change or addition alleged to be made in the information consists of the following words: "Him, the said Harold C. Crownover." Defendant does not undertake to show wherein the addition of these words worked to his prejudice, or changed in any way the substance of the crime charged. If omitted the information would still be sufficiently explicit to charge the crime. The addition is wholly immaterial, and the ruling of the court was not prejudicial.

Instruction No. 11, given by the court on its own motion, is based on the theory that the shooting occurred while defendant was engaged in the perpetration of, or attempt to perpetrate, a burglary. It is argued that this is unsupported by the evidence, because, it is said, even if it were admitted that defendant was one of the parties who had burglarized the store buildings, the burglary was completed before the shooting occurred, and defendant "had got nearly a mile away from the scene of the burglaries." Defendant cites *Hayward v. State*, 97 Neb. 9, and insists that the crime of burglary is complete whenever there is a wilful, malicious, and forcible entry of a storehouse, with intent to steal property of any value, or to commit a felony. This may be true; such acts alone may be sufficient to constitute a burglary; but it does not follow that, if the breaking and entering are complete and the burglar then attempts to make an escape from the scene of the crime, while pursued by officers of the law, and, in the furtherance of his efforts to escape, shoots and kills another, such killing is not included in the burglary under the provision of section 8581, Rev. St. 1913.

Instruction No. 12 is subdivided and criticized as not a proper statement of the law applicable to the second and third counts of the information. It is argued that this

instruction permits a conviction of murder in the first degree as a principal upon an assumed state of facts which would make him guilty as an accessory only. When the charge is read as a whole, the instruction is not subject to this construction, and the facts in evidence warrant a finding that he was in fact a principal to the burglary. Further complaint is made of this instruction because it does not tell the jury that, in order to constitute murder in the first degree, the killing must have occurred while the slayer was engaged in the perpetration, or attempt to perpetrate, a burglary. When the entire charge is read, these matters are, however, sufficiently covered.

Error is predicated on the giving of instruction No. 25½, which reads as follows: "If the evidence fails to establish beyond a reasonable doubt that the defendant Francis did not participate in the burglary, and did not consort with said burglars in said offense, and if you further believe that the defendant did not participate in the shooting, then you should find the defendant not guilty." It is apparent that the use of the word "not" before the word "participate," and its use again before the word "consort," are typographical errors. The instruction tells the jury that certain facts must be proved by the evidence beyond a reasonable doubt, and that, if not so proved, defendant must be found not guilty. It is clear that words are included in the instruction which were not intended to be there, or that words intended to be there are omitted. It does not point out any condition which would warrant a verdict of guilty. Other paragraphs of the instructions clearly and explicitly state the law applicable to the charge and the evidence. This instruction, even if properly phrased, would be only a repetition of the substance of other paragraphs properly given. In the form in which it is found in the transcript it is meaningless and could not have been to the disadvantage of defendant.

In the final assignment it is claimed that the evidence is insufficient to sustain the charge of murder in the first degree, as charged in the first count of the information; it being argued that the evidence fails to show malice, premeditation, and deliberation. We have already stated the facts surrounding the shooting. It is conclusively shown that, when defendant and his companion were overtaken by the officer and his posse, they had their guns drawn and were ready to shoot upon the arrival of the marshal and his aids. Upon being accosted by the officer, if not even before he spoke, they opened fire, discharging ten or twelve shots with deadly effect. We have held that parties using deadly weapons intend the natural and probable consequences of their use. *Kirk v. State,* 103 Neb. 484. No special period of time for premeditation and deliberation is required in order to constitute the unlawful taking of human life murder in the first degree. The record clearly shows that these men determined to effect an escape. Their employment of deadly weapons must have been in furtherance of that purpose. It cannot be doubted that, when they drove their car to one side of the road, drew their guns, and awaited the arrival of the marshal, they had determined upon taking the lives of their pursuers.

The record is free from any error to the prejudice of defendant. Indeed, the jury tempered justice with mercy and imposed a lighter penalty than defendant might have received under the evidence. The judgment is

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

LOUIS HUTTER V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21014.

Intoxicating Liquors: EVIDENCE. Evidence reviewed in the opinion *held* insufficient to sustain a conviction under section 11, ch. 187, Laws 1917.

Hutter v. State.

ERROR to the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Reversed.*

A. E. Langdon and *Murphy & Winters,* for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Ralph P. Wilson, contra.*

MORRISSEY, C. J.

Defendant was convicted in the district court for Sarpy county of having and keeping intoxicating liquors in a barn or shed the same not being his private dwelling-house, in violation of section 11, ch. 187, Laws 1917.

The testimony shows that this shed was 18 or 20 feet wide, 60 feet long, and opened on an alley at the rear of defendant's place of residence. On the evening of September 15, 1918, the building was destroyed by fire. The members of the local fire department, together with other citizens, went to the premises to assist in fighting the fire. The building was used as a general storeroom and garage. Defendant had been engaged in the meat business, and also in the sale of macaroni. A miscellaneous assortment of goods and chattels, including an automobile, a considerable quantity of macaroni, macaroni sacks, furniture, and stock food or medicine, were kept in the building. Practically all of this stuff was destroyed by the fire. According to the testimony of the witnesses for the state, while they were going through the mass of debris with a view of extinguishing the fire, they came upon a box, or case, containing numerous bottles filled with liquid. There is some discrepancy as to the number of bottles; one witness places the number as low as 6, while others estimate the number as high as 24. All agree, however, that they were of uniform size and shape, and that they were placed in regular order in the case, with cardboard between the bottles. The fire appears to have burned away the greater part of the case

and to have heated the bottles to such a degree that, when one of the witnesses undertook to pick one up by the neck, the bottle broke. One witness testifies that he poured some of the liquid into his hand, and that it had the odor of whiskey. The witnesses who stood around while he was doing this corroborate his testimony. One of the parties, with an iron bar, broke every bottle in the case, permitting the liquid to flow out upon the ground. The witnesses for the state testify that they saw these bottles broken, and that the contents had the odor of whiskey. Defendant was not present, and is in no way responsible for the destruction of the bottles. The evidence is not clear as to whether the bottles bore labels. One witness says they did, but, if so, the labels were not read, and neither bottle nor label was offered in evidence.

The cross-examination of the state's witnesses shows that they could not tell, with any degree of certainty, the difference between the odor of whiskey, alcohol, "anti-freeze," and kindred liquids. Defendant testified that he had quite a quantity of "anti-freeze" liquid in the building, which was intended for use in automobile radiators, and we think it may be fairly said from the record that the odor of this liquid might be mistaken for that of whiskey, especially when smelled in connection with the mass of debris that was then on fire. It is not disputed that defendant was a man of good-standing in the community. The presence of the "anti-freeze" liquid in the building, the improbability of a man storing whiskey where it would be within reach of every passer-by, together with the good character of defendant, and the absence of even a suggestion in the record that he either used or trafficked in intoxicants, may reasonably raise a doubt as to his guilt.

In addition to this, the record shows that defendant's son, who was then in the army, had left some goods in the building, and the representative of a packing-house also used the building as a storeroom. Defendant denied

that he had any liquor, or that he had any knowledge of any liquor in the shed. The witnesses for the prosecution who found this case of bottles might easily have preserved them, or at least one of them. They might have read the labels, if there were labels. The contents of the bottles was the best evidence of what they contained and ought to have been preserved in place of being poured into the debris and a jury asked to convict upon mere conjecture.

The evidence is insufficient to sustain the verdict, and the judgment is

REVERSED.

SEDGWICK and DEAN, JJ., not sitting.

JAMES L. PARKER V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21115.

The controlling questions presented are covered by the opinion in *Francis v. State, ante, p.* 5.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Ralph P. Wilson, contra.*

MORRISSEY, C. J.

From a verdict of guilty of murder in the first degree, and a sentence to imprisonment in the penitentiary for life, for the killing of Harold C. Crownover, defendant prosecutes error to this court.

The information is in the same form as the information in *Francis v. State, ante,* p. 5.

Defendant was the companion of Francis, and the evidence and instructions in the two cases are substantially the same. The difference is that instruction No.

25½, given in the *Francis* case, was not given in the instant case, and that instruction No. 10, given in both cases, but not criticized in the *Francis* case, is complained of here. It is argued that, under this instruction, the jury were permitted to find defendant guilty of murder in the first degree, though defendant intended to kill some person other than Crownover, and the killing of Crownover was merely an accident. The instruction is not open to this construction under the evidence. Defendant and his companion, Francis, were apprehended in the commission of a burglary. They attempted to escape and were closely pursued by the city marshal and four other citizens who volunteered to assist him in making an arrest. All parties were traveling in automobiles. Defendant and companion drove their car to one side of the road, awaited the arrival of the other car, and, when it drew up and the marshal called upon them to surrender, they opened fire upon the party, killing two and wounding a third. There is nothing in this conduct to suggest an accidental killing. It is clear that the purpose was to kill the entire party, if necessary, to enable them to make good their escape. In view of this situation, the instruction was not prejudicially erroneous.

In all other questions, the opinion in *Francis v. State, supra,* is controlling, and the judgment is

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

HORACE E. GODDEN ET AL., APPELLEES, V. WILLIAM LONG ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. No. 21121.

Descent and Distribution: "LAWFUL ISSUE." The term "lawful issue," as used in the first subdivision of section 1266, Rev. St. 1913, *held* to mean *descendants* generally, and not merely *children*, and to entitle the great-grandchildren of an intestate to share in the inheritance of real estate according to the rights of representation.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Strode & Beghtol, for appellants.

Charles E. Matson, contra.

MORRISSEY, C. J.

This cause comes here under rule 14 (94 Neb. xiii) of this court, as a case stated. There is no disputed question of fact, but a construction is asked of the following provision of section 1266, Rev. St. 1913:

> "Section 1266. When any person leaving no husband or wife surviving shall die, seized of any real estate, or any right thereto, or entitled to any interest therein in fee simple, or for the life of another not having lawfully devised the same, it shall descend subject to his debts, in the manner following:
>
> "First—In equal shares to his children, and to the lawful issue of any deceased child by the right of representation; and if there be no child of the deceased child living at his death, the estate shall descend to all his other lineal descendants; and if all said descendants are in the same degree of kindred to the deceased, they shall have the estate equally; otherwise they shall take according to the right of representation."

The immediate question is whether the term "lawful issue," as used in the subdivision quoted, means *children* or *lineal descendants.* Defendants contend that it means children only, and the great-grandchildren of an intestate, through a predeceased daughter, cannot share in the inheritance of real estate where there are surviving children of the intestate. Plaintiffs contend that "lawful issue," as used in the statute, refers to descendants generally, and they, as great-grandchildren, are entitled to share in the inheritance of intestate's real estate according to the rights of representation. The district court entered judgment for plaintiffs.

The term "issue," or "lawful issue," in its primary legal sense, means descendants or lineal descendants generally, and not merely children. 3 Words and Phrases (2d series) 46; 23 Cyc. 359. It is only when it is used in a special instrument, whose context shows that a narrower construction was intended, that its meaning will be limited. *Chwatal v. Schreiner*, 148 N. Y. 683, 688. There is no reasonable foundation for assuming that other than the usual legal meaning was intended by the legislature in this statute. In fact, a reading of the subdivisions following the one in question, where the term "issue" is employed, clearly indicates that the legislature did not regard "issue" as synonymous merely with "children."

The judgment of the district court is

AFFIRMED.

ALDRICH, J., not sitting.

LIBBIE E. LANG, APPELLEE, V. ROSA LEE COIL, APPELLANT.

FILED DECEMBER 15, 1919. No. 20572.

Partition: CONTRACT: CONSTRUCTION. A contract between two heirs, by which a conveyance was to be made by A. of the shares of all the heirs in certain lands except that of B. to B., and by B. of her share in certain other tracts of the inherited land to A. by warranty deed, does not require a better title to be conveyed than that held by their intestate. The covenants of warranty relate to the title to the shares, and not to the title to the land.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites*, for appellant.

J. E. Porter, contra.

LETTON, J.

Plaintiff and defendant, Rosa Lee Coil, were two of the heirs to the estate of one McLain, a nonresident who

died intestate, leaving certain lands in Nebraska. Plaintiff acquired by purchase from all the other heirs, except the defendant Coil, their entire interest and estate in all of the Nebraska land. By a written agreement between plaintiff and defendant, it was provided that plaintiff and her husband would, "on or before the 1st day of March, A. D. 1913, and as soon as they shall obtain deeds in form from the other heirs and the widow of said deceased, before that time, convey by a good and sufficient warranty deed *all of said shares,* including their own, to the said Rosa Lee Coil in and to the following described land." (Here follows legal description.) In consideration of said grant, the said Rosa Lee Coil and her husband agreed that they would on the 1st day of March, 1913, pay to Libbie E. Lang the sum of $3,200 in cash, and would execute and deliver to her "a good and sufficient warranty deed *of the undivided share and portion* of the said Rosa Lee Coil as an heir at law of said deceased in and to the following described land belonging to said deceased at the time of his death, to wit: (Description follows.) The delivery of said deed and the payment of said money to be concurrent with the delivery of the deed hereinbefore stipulated for by the said Libbie E. Lang and husband, both of said deeds to carry a good and indefeasible title *to the shares of said parties* in and to the lands and interests therein purported to be conveyed."

The petition alleges that, shortly after plaintiff secured the deeds from the other heirs mentioned, she tendered her warranty deed to Rosa Lee Coil to the property agreed to be conveyed to her, but she refused to accept it, claiming that there was some defect in the title; that plaintiff remedied the defects suggested, and again tendered the warranty deed and demanded compliance with the contract, but defendants still refuse to accept the deed or pay the consideration. The answer pleads that defendants have kept the covenants and conditions of the contract; that the parties have each enter-

ed into possession of the lands to be received by them; that plaintiff contracted that the title to the land to be conveyed to defendants should be a good and indefeasible one; that it was known and understood that the titles were defective, and that it would be necessary for plaintiff to quiet the title to some of the lands; that plaintiff at the time she tendered the deed did not have, and does not now have, a good and indefeasible title to the land, or any part thereof; that administration was taken out on the estate of McLain, but has never been completed; that the title of the plaintiff and the heirs at law is subject to the debts of the deceased; that there exists unpaid claims in the sum of $250 and more, but no decree of heirship has ever been entered; and also alleging other flaws in the titles; that defendants are, and always have been willing "to receive said conveyances and to pay said moneys upon being tendered good and sufficient warranty deeds conveying a good and indefeasible title of record in said lands."

The reply denies every allegation of new matter in the answer. A supplemental petition pleads the settlement of the McLain estate, and an order of distribution to the heirs made on October 15, 1917. The court found upon the pleadings for the plaintiff, rendered judgment accordingly, and defendant appeals.

The question presented is, whether the contract requires that a perfect title to the lands be conveyed by plaintiff. Defendant argues that, in the absence of an express provision indicating the character of the title provided for by a contract of sale of real property, the implication is that a good and marketable title in fee simple is intended, and that the contracts required that "a good and indefeasible title" be conveyed by "good and sufficient warranty deeds." Plaintiff insists that the contract was not to convey a good and indefeasible title to the lands by warranty deed, but it was to convey a good and sufficient title to the respective

shares of the parties in the lands in Nebraska belonging to the McLain estate, and that defendant is only entitled to title such as the heirs inherited.

We believe the latter to be the proper construction of the contract. These heirs were undertaking to partition the lands by agreement. Plaintiff only agreed to convey the shares obtained from other heirs, together with her own, to the defendant, and defendant only agreed to convey her share to plaintiff. The contract provides: "Both of said deeds to carry a good and indefeasible title *to the shares* of said parties in and to the lands therein purported to be conveyed." The obligation rests alike on each of the parties.

In our opinion the deed tendered more than fulfils the the obligations of the contract. We find no error in the judgment of the district court.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

ANDREW A. CARLSON ET AL., APPELLANTS, V. JAMES A. RAY ET AL., APPELLEES.

FILED DECEMBER 15, 1919. No. 20576.

1. **Justices of the Peace: JUDGMENT: VACATION.** Justices of the peace and county courts exercising the jurisdiction of justices of the peace have no equity power to vacate a judgment after the time to appeal therefrom has expired.

2. ———: ———: ———. The statutory power to vacate a fraudulent judgment procured at a former term of court by the prevailing party does not extend to a justice of the peace or to a county court exercising the jurisdiction of a justice of the peace.

3. ———: ———: **FRAUD: INJUNCTION.** Where plaintiff in an action before a justice of the peace procures by fraud and perjury an unconscionable judgment, prevents an appeal therefrom by the same methods, and attempts to enforce the fraudulent judgment in another county by means of a transcript and an execution, the district court in which the transcript is filed may, on a proper petition in equity, enjoin the judgment creditor and the sheriff from proceeding under the execution.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. E. Porter, for appellants.

E. D. Crites and *F. A. Crites, contra.*

ROSE, J.

This suit was commenced in the district court for Dawes county to prevent the execution of a judgment which the county court of Fillmore county, exercising the jurisdiction of a justice of the peace, had rendered against plaintiffs for $179.93 on a promissory note. A transcript of the judgment had been filed in the office of the clerk of the district court for Dawes county and collection is attempted by means of an execution in the hands of the sheriff of Dawes county. The trial court sustained a demurrer to the petition and dismissed the suit in equity. Plaintiffs have appealed.

The question presented by the appeal is the sufficiency of the petition. Plaintiffs herein are the signers of the note and reside in Dawes county. C. W. Buckley, James A. Ray and Vet Canfield are defendants. Buckley is named in the note as payee and resides in York. Ray claims to be assignee of Buckley, is the judgment creditor and resides in Fillmore county. Canfield is the sheriff of Dawes county and the execution is in his hands.

For the purpose of testing the demurrer the wrongs of which plaintiffs complain may be outlined as follows: Buckley operated what he termed the "York Business College and Normal School." By means of an agent employing false representations, alluring promises and other forms of deceit Buckley enticed Mary Carlson, one of the plaintiffs herein, a minor, into promising to attend the school named and into signing the note in controversy for tuition. In like manner the child's parents, who are the other plaintiffs herein, were induced to consent to their daughter's becoming a pupil of Buckley. Intending only to commit such consent to writing they were

tricked into signing the note. Plaintiffs advanced $17 on tuition. The minor child became a pupil of Buckley, remained in York a short time and withdrew without benefit to herself after Buckley had violated his duties and broken his promises. Afterward Buckley corruptly entered into a conspiracy with Ray to procure a judgment against plaintiffs by fraud and perjury. In furtherance thereof Buckley left his residence in York, went into Fillmore county and was there served with a summons in an action wherein he was ostensibly made a defendant for the fraudulent purpose of procuring from the county court of Fillmore county a summons which was served on plaintiffs here in Dawes county. In the action on the note plaintiffs herein were the only real defendants. They were thus summoned to appear in a forum far removed from their residence, where the cost of a defense would exceed the amount for which the action was brought. By special appearance they objected to the jurisdiction of the county court of Fillmore county and the objection was sustained. Later, in the same case, they were again served with summons in Dawes county and again objected to the jurisdiction of the county court of Fillmore county but that court was induced by the fraud and perjury of the conspirators to entertain jurisdiction and to enter judgment against plaintiffs. Answers in the county court of Fillmore county, pleading fraud as a defense to the note, are made a part of the petition in equity. Plaintiffs were taken by surprise as a result of the conspiracy and perjury, and not being present in Fillmore county at the time, not being acquainted there, and having no property there, were unable to procure or arrange for an appeal or for a supersedeas within the time allowed by law. If the allegations of the petition in equity are true the judgment of the county court of Fillmore county is iniquitous and unconscionable.

Does the petition in equity state a cause of action? One ground of demurrer is stated as follows:

"The plaintiffs in this case, as defendants in the cause mentioned in the petition, having challenged the jurisdiction of the justice of the peace, and having also entered a general appearance by way of answer and plea in said cause, and having suffered adverse judgment, and having failed to appeal from said adverse judgment, are bound thereby, and the same has become *res judicata*, and may not be assailed in these proceedings by collateral attack or otherwise."

To justify the sustaining of the demurrer defendants herein insist that plaintiffs in equity filed answers in the original action, pleaded to the merits therein, and thus submitted their defense to the county court of Fillmore county; that judgment was rendered against them; that plaintiffs in equity had adequate remedies at law by application to the court of original jurisdiction and by appeal; and that therefore relief in equity is not grantable under the petition herein.

The first of the remedies suggested is unavailing. Justices of the peace and county courts exercising the jurisdiction of justices of the peace have no equity power to vacate a judgment after the time to appeal therefrom has expired. The statutory power to vacate a fraudulent judgment procured at a former term of court by the prevailing party does not extend to a justice of the peace or to a county court exercising the jurisdiction of a justice of the peace. Rev. St. 1913, secs. 8207, 8215; *Cadwallader v. McClay*, 37 Neb. 359. Conceding the allegations of the petition in equity to be true, it is clear, however, that the fraudulent judgment of the county court of Fillmore county could be canceled by a proper exercise of the equity powers of the district court for that county. *Cadwallader v. McClay*, 37 Neb. 359. The serious question then is the authority of the district court for Dawes county, as a court of equity, to enjoin proceedings under the execution issued on the transcribed judgment. The general rule is that the application for such an injunction should be made in the venue of the court

of original jurisdiction. 17 Cyc. 1185. This rule has a substantial foundation in justice and reason. Conflict in the jurisdiction of courts of equal rank can only be avoided by the application of such a rule. The judgments of the courts in the venue of original jurisdiction and of the appellate courts, except for the purposes of liens and executions, are beyond the reach of the process or judgment of other courts. The power of courts of original jurisdiction over their own judgments and processes is not changed by the transcribing of the judgments to other forums. Transcripts, when filed elsewhere, serve the purposes of liens and executions only. Except as thus affected, the original judgments and the control of the courts in the venue of original jurisdiction remain unchanged. The respective powers of different courts of equal rank in respect to original and transcribed judgments was discussed in *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272, where it was observed:

"The jurisdiction of the court to which the judgment is transferred is not the same as that of the court rendering the judgment, unless made so by statute. The powers are derived from different sources. The court of original jurisdiction adjudicates the matters in controversy and gives vitality to the obligation or liabilities involved in the litigation. In rendering and in enforcing its judgment, it acts under general authority conferred by the Constitution and statutes. When the transcript enters another jurisdiction, the office of the transfer is the enforcement of the judgment, and in the new sphere of operation the statute makes provision for a lien and for execution."

In the present case, therefore, the district court for Dawes county cannot change or cancel the original judgment, and the equitable jurisdiction in the new territory is limited to the transcribed lien and the execution. According to the petition in equity the lien of the unconscionable judgment procured by fraud and perjury

in the county court of Fillmore county has gone beyond the original venue and has become in Dawes county an instrument of wrong and oppression. As such it clouds title to land of plaintiffs in equity and by levy may become a lien on their personal property. If the expense of a defense in the original action more than 400 miles from the residence of the plaintiffs in equity would exceed the claim in litigation and if the original judgment was procured, and the right of appeal defeated, by fraud and perjury, it is fair to presume that an application to the district court for Fillmore county for equitable relief would not afford an adequate remedy. It would be a reproach to equity in a situation of this kind to hold that relief cannot be granted in Dawes county, where the unconscionable lien and oppressive execution are employed to gather the iniquitous fruits of fraud and perjury. In *Tomkins v. Tomkins,* 3 Stockt. (N. J.) 512, the Chancellor said:

"The power of a court of equity to look into the judgment of other courts, and relieve against them, on the ground of fraud, is well established. * * * Where the judgment has been procured by artifice or concealments, on the part of the plaintiff, and the court where the fraud has been perpetrated is not able to afford adequate relief, there this court will take hold of the party who has committed the fraud, and will prevent his using the judgment to the injury of his adversary."

Courts of equity have often exercised this power. *Smoot v. Judd,* 161 Mo. 673, 84 Am. St. Rep. 738; *Pollock v. Gilbert,* 16 Ga. 398, 60 Am. Dec. 732; 1 Black, Judgments (2d ed.) sec. 371; 10 R. C. L. 304, sec. 47. Relief of this nature is not necessarily confined to courts in the venue of original jurisdiction. In *Zimmerman v. Makepeace,* 152 Ind. 199, the doctrine is stated as follows:

"The court of one county may restrain the illegal sale of lands in such county under an execution issued from the court of another county."

Interference with the right of appeal from a fraudulent judgment has also been held to be ground for equitable relief. In *Roberts v. Cantrell,* 3 Hayw. (Tenn.) 219, it was held:

"Where a party has become without remedy at law, and by no fault or neglect on his part, as for example, where, being a stranger, he was unable to get sureties for an appeal, or *certiorari* from a justice's judgment, equity will relieve."

As a pleading the petition in equity seems to be sufficient to justify the district court for Dawes county in canceling the transcribed lien and in enjoining proceedings under the execution. In this view of the case there was error in the sustaining of the demurrer and in the dismissing of the suit in equity. The dismissal is therefore reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK and ALDRICH, JJ., not sitting.

CHARLES TANKERSLEY, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED DECEMBER 15, 1919. No. 20760.

1. **Carriers: INJURY TO PASSENGER: LIABILITY.** A street railway company cannot evade its duty to passengers by its operating contracts with other corporations, or thus avoid liability for negligence resulting in personal injury to passengers.
2. **———: ACTION FOR PERSONAL INJURIES: DAMAGES: INSTRUCTIONS.** In an action for personal injuries resulting from the negligence of defendant, it is prejudicial error to instruct the jury, in estimating the damage to plaintiff, to consider "the probable expense of his personal livelihood."

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

Berge & McCarty, contra.

ROSE, J.

This is an action to recover damages in the sum of $15,000 for personal injuries alleged to have been caused by the negligence of defendant. On O street in Lincoln plaintiff, after dark, boarded a street car on the street railway running westward to Capital Beach, alighted at the regular stopping place or station near the east side of Lakeview and started to walk westward on a cinder path running from the street railway station along the north side of the street railway track to the east end of a cement sidewalk. The cinder walk and the electric railway cross the Chicago, Burlington & Quincy Railroad track at right angles. When there is no street car on the crossing an arm six feet or more above the ground extends south across the cinder walk and the street railway track from a perpendicular iron post a few feet west of the railroad track. The moving of the arm to permit a street car to cross the railroad track turns the iron post and by means of two wires, running one above the other through a duct under the street railway track, operates a signal on the railroad 2,000 feet south of the crossing. The wires were exposed for two or three feet before entering the duct. Plaintiff, while following the cinder walk across the railroad tripped on these wires and fell. To recover damages for resulting injuries this action was brought. Negligence in knowingly permitting the dangerous condition to exist and in discharging plaintiff from the street car under an implied invitation to use the cinder walk without warning him of the danger is imputed to defendant. Defendant denied negligence and liability for damages and pleaded negligence on the part of plaintiff. The case has been tried twice. The first trial resulted in a judgment in favor of plaintiff for $3,200, but it was reversed for error in the proceedings. *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578. At the second trial plaintiff recovered a judgment for $4,300. Defendant has again appealed.

Defendant asserts that it did not install or maintain the wires, and that it was without authority to meddle with them, and argues that it is not liable for the negligence charged. In this connection it is insisted that the signal system was installed and maintained by the Chicago, Burlington & Quincy Railroad Company pursuant to a contract with the Lincoln, Capital Beach & Milford Railway Company, the latter being owner of the street railway track on which defendant, under a contract, operates its street cars from Lincoln through Lakeview to Capital Beach. On these grounds defendant cannot escape liability, if it was negligent in the performance of its duties to plaintiff as a passenger. The consequence of such negligence cannot be evaded by contract. Though street cars on the Capital Beach line did not run farther west at the time of plaintiff's injury than defendant's station east of Lakeview, defendant in fact operated the signals while running street cars to the pleasure resort at Capital Beach during the summer season. The post and wires at the place of the dangerous exposure were on premises occupied both by defendant and the Chicago, Burlington & Quincy Railroad Company. Under the evidence defendant may fairly be charged with knowledge of existing conditions. In the night it discharged plaintiff, a passenger, on a cinder platform connected in a direct line west by a short cinder walk with the east end of a cement walk on the north side of the principal street of Lakeview. This cinder walk ran along the north side of a public highway close to and parallel with the street railway track where it crossed the railroad track. Under the circumstance plaintiff had an implied invitation from defendant to follow this cinder walk. In doing so he tripped on the wires and was injured. He had not been warned of the dangerous wires and in the dark was not aware of his peril. Defendant, had he known of the danger, could have gone south from the cinder platform of the street railway station across the street railway track, turning west in the public highway, thus

avoiding the wires, but his natural course was directly west where he was also invited by defendant to go. In any event he could not avoid crossing the railroad track. While the arm across the street railway track and other signals indicated a crossing at a public highway, they did not necessarily give warning in the night of the dangerous wires. It may also be inferred that the arm did not warn foot passengers not to cross the railroad on the cinder walk, since they could and did pass under the arm. These conclusions are fairly deducible from the evidence, and they clearly show that the negligence imputed to defendant may be inferred from the proofs.

For another reason, however, the verdict cannot be permitted to stand. The trial court directed the jury, if they found plaintiff was entitled to recover, to consider as an element of damages "the probable expense of his personal livelihood." This was a direct misstatement of the law, and there was no basis in the evidence for an estimate of such expense. How much the jury included in their verdict on account of this item cannot be ascertained. The error was manifestly prejudicial to defendant. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK and ALDRICH, JJ., not sitting.

C. L. HUSTEAD, APPELLANT, V. RICHARDSON COUNTY ET AL., APPELLEES.

FILED DECEMBER 15, 1919. No. 20586.

1. **Counties: VOID CONTRACT: LIABILITY.** When valuable services are rendered a county under a void contract, the county will be liable for the value of the benefits so received if the county board could have made a valid contract for such services. (ROSE, J., dissenting.)

2. **Paupers: COUNTY BOARD: UNAUTHORIZED CONTRACT.** A contract by a county board to pay a specified sum to one who will undertake to satisfy all contingent claims under the poor laws that might

arise against the county is in the nature of insurance against such claims, and is not authorized by the statute.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

J. E. Leyda, for appellant.

Kelligar, Ferneau and *Gagnon, contra.*

SEDGWICK, J.

The plaintiff presented a claim to the county board of Richardson county under a contract with the county whereby he agreed to furnish medical services for the poor of the county as county physician, and also to provide "medicines, nurses, surgical operations, and assistants," and other things specified in the contract. The county board allowed the claim, and certain taxpayers of the county appealed from the allowance of the claim to the district court. The plaintiff filed a petition in the district court, to which the court sustained a general demurrer, and dismissed the case, and, the plaintiff has appealed.

The petition alleged that the plaintiff is a physician and surgeon, and that "the county board had been employing medical or surgical care, medicines, nursing, and hospital service for each individual case as the needs arose, and on April 16, 1915, the county board of Richardson county, having found from the experience of the last two or three preceding years that it was costing the county some $2,000 or $3,000 a year to provide needed medical service, surgical attention, nursing, hospital accommodations, medicines, and supplies for the indigent poor of the county, and for those inhabitants of the county who were unable to provide such needs for themselves in cases of emergency," instructed the county clerk to "advertise for bids for a physician to do the medical and surgical work, provide all medicines, nurses, surgical operations, and assistants for same, and medical supplies to care for the indigent poor of the county,

and all those inhabitants of the county who were unable to provide such needs for themselves in cases of emergencies;" that the plaintiff's bid was accepted by the board and the contract entered into with provisions as specified in the advertisement; that he had performed all the duties under the contract for two months, and asked to recover for those two months at the rate of $900 a year as specified in the contract.

It has frequently been decided in this state that, even if the county board has exceeded its powers in entering into a contract under which the services were rendered, still the county would be liable for valuable benefits received by it under the contract for which the county would be liable under a valid contract. *Clark v. Dayton,* 6 Neb. 192; *Cass County v. Sarpy County* (on rehearing), 66 Neb. 476; *Gibson v. Sherman County,* 97 Neb. 79.

The petition demurred to, however, in this case does not allege any special service rendered by the plaintiff beyond his acting as county physician, for which the law limits the salary to $200 a year, nor any special benefit received by the county which the county commissioners might have authorized and for which the county would be liable. The county commissioners are not authorized to procure insurance for the county against the contingency that such claims as those specified in this contract might arise against the county. An agreement to pay a specified sum for undertaking to satisfy all such claims would be in the nature of insurance, and would seem to be beyond the power of the county. It seems to follow that the petition failed to state a valid claim against the county. The $200 salary which the statute allows is for the year which was not yet completed when this claim was filed.

The demurrer was properly sustained, and the judgment of the district court is

AFFIRMED.

EMMA KAUFFMAN PALMER, APPELLEE, V. THOMAS E. PARMELE, APPELLANT.

EMMA KAUFFMAN PALMER, APPELLEE, V. THOMAS E. PARMELE, APPELLANT: JAMES TERRYBERRY ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. Nos. 20963, 20964.

1. **Appeal:** ABANDONMENT. When the trial court dismisses an intervener from the case, and he takes an appeal to this court, but presents no brief, although it is alleged in the brief of opposite counsel that there is no merit in his intervention, the intervener will be considered to have abandoned the appeal.
2. ———: LAW OF THE CASE. When the principal matters are determined by this court upon appeal, and specific questions are referred to the trial court for trial, the issues so determined become the law of the case as against the parties to the former appeal.
3. ———: INSTRUCTIONS. In such case the trial court should state the law in his instructions to the jury as so determined by this court, and, if he should state a wrong reason for so doing, that would not necessarily render such instruction erroneous.
4. ———: AFFIDAVIT: EVIDENCE. An affidavit filed in support of a motion for new trial in the district court will not be evidence of rulings of the court in the trial or in the proceedings preparatory for the trial.
5. **Witnesses:** COMPETENCY. A plaintiff who derived title from a decedent is a competent witness as to that title against a defendant who denies her right. If other parties intervene in the action, claiming as representatives of the deceased, against whom the plaintiff would not be allowed to testify as to transactions with the deceased, such testimony would be competent as against the defendant upon his sole appeal.
6. **Appeal:** INSTRUCTION. An instruction that might be erroneous and prejudicial to the plaintiff will not require a reversal on appeal of the party not prejudiced thereby.
7. **Trial:** AFFIDAVIT OF JUROR: EVIDENCE. An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict.

Palmer v. Parmele.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Jesse L. Root, C. A. Rawls and *W. A. Robertson,* for appellants.

D. O. Dwyer and *Brogan, Ellick & Raymond, contra.*

SEDGWICK, J.

When this case was in this court upon a second appeal, 101 Neb. 691, 695, the issues presented were determined upon the record then presented, with the exception of two questions, which were reserved and referred to the trial court for a new trial. These two questions were "the value of these bonds less the amount loaned thereon and not returned," and "whether there were deductions made from the $50,000 purchase price, and so ascertain the net amount received by the Norfolk company, and compute the proportion that should have been applied upon these bonds accordingly." When the case was returned to the district court, Peter Volk and others, claiming to be the heirs at law of the deceased, William Volk, were allowed to intervene, presumably upon suitable terms, and they alleged that they were entitled to an interest in the bonds in question, and the case appears to have been tried upon the theory that these interveners had presented issues against both the plaintiff and the defendant. The trial resulted in a verdict and judgment in favor of the plaintiff, and against the defendant Thomas E. Parmele in the sum of $7,415.27. From this judgment the defendant Parmele appealed to this court, and the interveners also prosecuted a separate appeal. It is suggested in the appellee's brief that, as an administrator had been appointed for the estate of William Volk, deceased, who was entitled to recover whatever assets belonged to that estate, these interveners were not entitled to any relief in this case. The trial court seems to have so held. The interveners have not presented any brief or appeared further in the case.

The interveners having abandoned their appeal, the questions for us to determine are between the plaintiff and the original defendant, Thomas E. Parmele. It would seem from some of the instructions given to the jury that the trial court, as well as the parties, has ignored the fact that only the two questions above specified were submitted to the trial court upon the last appeal, and several matters that were finally determined upon that appeal are again somewhat discussed in the present briefs.

1. The court instructed the jury: "You are therefore instructed that the plaintiff became the owner of said bonds and stock involved in this action on the 7th day of January, 1911." This instruction was correct, as that question was disposed of on the former appeal, and was not submitted for further trial. The fact that the trial court gave a wrong reason for the instruction would be immaterial.

2. It is complained that the trial court ruled "that appellant and interveners combined should have but three challenges." It is not necessary to determine whether such ruling would be erroneous in an action of this kind, because the question is not presented by the record. After the verdict and judgment there was an affidavit filed upon a motion for a new trial, reciting that the court made such a ruling, and that "at said time the jurors had all been examined for cause, and three of the jurors had been excused for cause, and there remained in the box sixteen jurors; the plaintiff exercised but one challenge and waived the other two challenges; the defendant exercised two challenges and the interveners one challenge, and there remained twelve men in the box; the said jurors were then sworn to try said cause; that, if the court had permitted the defendant to have exercised three challenges, counsel for defendant would have peremptorily challenged another of the jurors, and thereby would have excused one of the jurors who participated in the trial of said cause." It appears from the record

that the practice in the trial court in calling jurors for examination on their *voir dire* was similar to that mentioned in *Koran v. Cudahy Packing Co.*, 100 Neb. 693. The record of the trial itself must show how such questions were presented to the trial court, and show with accuracy his ruling thereon. An affidavit filed after the verdict and judgment is not sufficient to present such questions to this court for review. *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127. This ruling was examined with care upon rehearing, 55 Neb. 752, and adhered to, and was later re-affirmed in *Hamblin v. State*, 81 Neb. 148. The defendant has not in his brief referred to any part of this very voluminous record containing such ruling of the trial court.

3. If the collateral heirs of William Volk could be said to be the representatives of the deceased, that is, if they instead of the administrator were the proper party to intervene, the competency of the plaintiff to testify upon the issues so presented would be questionable, but as between the plaintiff and the defendant Parmele it cannot be said that the defendant was the representative of the deceased, and on that issue the plaintiff would be competent to testify. Therefore there was no prejudicial error as against this appellant in the court's ruling allowing her testimony.

4. The defendant Parmele was asked whether he had any business transactions with William Volk after the bonds and stock were deposited with him. This was objected to on the ground that the representative of the deceased was the adverse party. This was a transaction directly between the defendant and the deceased, and was incompetent. If it is true that the court allowed other similar evidence, such ruling may have been erroneously prejudicial to the plaintiff, but would not justify a continuance of erroneous rulings. The witness was allowed to testify to facts within his knowledge affecting the amount properly chargeable by the bank or the defendant against these bonds.

5. The instructions of the court as to the value of the bonds, and as to the burden of proof on the question of the defendant's converting the bonds, and that the bonds were held by the bank as collateral security were not prejudicial to this appellant, since those questions were not submitted for trial, but were determined upon the former appeal.

An affidavit of a juror as to what items the jury allowed or disallowed in computing the amount due, or what the jury believed they had a right to do under the instructions, is incompetent. Such matters are commonly held to inhere in the verdict.

Many instructions were offered by defendant and refused by the court, but, so far as they were correct and applicable to the issues to be submitted to the jury as determined by this court upon the former appeal, they were unnecessary because of the instructions given.

The principal question of difficulty is whether the evidence supports the verdict. The records, including bills of exceptions of the two former trials and the brief in this court, are attached to the bill of exceptions, and appear to have been allowed by the trial court as a part of the bill of exceptions in this case. Apparently some, but not all, of these records and briefs were actually received in evidence by the trial court. It appears that the defendant Parmele traded the stock and bonds to William Volk for a farm, and these securities were left with defendant and his bank for safe-keeping, and to maintain the credit of Volk with the bank and defendant. Many transactions both before and after this exchange appear to be involved in determining the liabilities chargeable against these bonds. The pleadings of the parties in the various stages of this litigation indicate changes of position as to the issues. There is conflict in the evidence, some of which on important matters is of a doubtful character. The methods pursued by both parties on the trial, together with the great mass of evidence introduced by them, not only on the issues submitted by

this court on the former appeal, but on various irrelevant matters, helped to complicate the questions presented to the jury. So far as we can ascertain from the record, the jury had delicate and very complicated questions to solve, and we cannot say that the verdict is so clearly wrong as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON and ALDRICH, JJ., not sitting.

JOHN GERDES V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21114.

1. **Criminal Law**: BURDEN OF PROOF. The burden of proof in a criminal prosecution is upon the state, and if the evidence fails to establish any essential element of the crime charged, the defendant must be acquitted.
2. **Sedition**: ELEMENTS OF CRIME. In a prosecution under chapter 5, Laws 1918 (Extraordinary Session), the essential element of the offense is the intent to obstruct the government in the prosecution of the war. Words spoken in anger in a quarrel will not justify a conviction, unless there is evidence from the circumstances or the connection in which they were used, or otherwise, that the defendant realized that the effect might be to so obstruct the government, and that he intended that effect.
3. ———: INTENT: EVIDENCE. The evidence indicated in the opinion does not prove such intent.

ERROR to the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

S. D. Killen, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres and *J. B. Barnes, contra.*

SEDGWICK, J.

The defendant was prosecuted under the act of 1918, commonly known as the "Sedition Act;" Laws 1918,

ch. 5. It was enacted with an emergency clause and took effect on the 9th day of April, 1918. Four days later the circumstances occurred upon which this prosecution is based. The act provides: "If any person with intent to obstruct, hinder, delay, discourage, hamper, or otherwise interfere with the efficient prosecution of the war in which the government of the United States is now engaged, shall," etc. Then follow thirteen specifications of acts which, if done with the intent specified, should constitute the crime of sedition. The penalty prescribed is a fine "in any sum not to exceed ten thousand dollars, or be imprisoned in the county jail or in the state penitentiary for any period not to exceed twenty years." The information contained eight counts, and the defendant was found guilty upon three counts, and sentenced to pay a fine of $1,000 and the costs of the prosecution. The first count of the information upon which the defendant was found guilty charges the defendant did "speak the following words and statements: * * * 'The Government is in with the grocers and millers to rob the poor men.' 'The flour that we have now would not make bread that a —— hog would eat.' 'The farmer that raises his own wheat has a right to grind it up and eat as much as he —— pleases.'" And the fourth count, on which he was also found guilty, charged substantially the same words. The fifth count charges that, referring to the county committee, the defendant said "the following words in substance: 'I don't give a —— what you tell that committee; you can tell them to go to ——.'"

There is such a conflict in the evidence as to the language used by the defendant that, without further discussion, it may be said that it presented a question for the determination of the jury. The vital question in the case is whether these words were spoken by the defendant "with intent to obstruct, hinder, delay, discourage, hamper, or otherwise interfere with the efficient prosecution of the war in which the government of the

United States" was engaged. If the defendant used the language ascribed to him, did he intend thereby "to obstruct, hinder, delay, discourage, hamper, or otherwise interfere with the efficient prosecution of the war?" "Burden of proving that offense has been committed rests upon the government; and if the evidence fails to establish any essential element of the crime charged, the defendant must be acquitted. * * * Suppose a case where all the testimony comes from the side of the prosecution: The defendant has a right to say that upon the proof so introduced no case is made against him, because there is left in doubt one of the essential elements of the offense charged, namely, the wrongful, unjustifiable, unlawful intent." *Commonwealth v. McKie,* 61 Am. Dec. 410 (1 Gray [Mass.] 61). Undoubtedly the intent can be proved by circumstances. If such language had been used at a public meeting called for the purpose of discouraging enlistment in the army, or the purchase of these bonds, or some other or all of the purposes of the government in the prosecution of the war, and it appeared that the speaker was in sympathy with the objects of the meeting, these facts, together with the circumstances and connection in which the words were used, might justify a finding of criminal intent.

The defendant is a man past 65 years of age. He was a native of Holland; born in that part of Holland which was near to the territory afterwards appropriated by Germany, and there is nothing in the record proving or even indicating that he sympathized with Germany in the war in which we were engaged. When he was 13 years old his father brought him to this country, where he has since resided, having become a citizen of this country. He was an industrious man, and had accumulated some property, and raised a family. He purchased liberty bonds in the amount of $1,650. Two of his sons were in the service, and the defendant was encouraging another son to enlist. In April, 1918, it appears the people of Gage county, as in other parts of our country,

were very much in earnest in assisting in the prosecution of the war, and, at the time in question, were especially earnest in securing subscriptions to the Government's Liberty Loan. The committee who had this in charge had made a list of those they thought ought to buy the bonds, stating the amount that each one ought to buy. It seems that they fixed this defendant's quota at $650. The defendant at the time was in very embarrassing circumstances. He was without ready money, and his immediate resources consisted of real estate upon which he could not procure an advancement for the purpose of buying these bonds, because of the fact that his wife was insane and not competent to execute with him the necessary securities. The patriotism and enthusiasm of the people prompted them to discuss with a good deal of earnestness the failure of any one, whose quota had been determined, to comply therewith in full, and it seems that they had discussed this defendant's failure to comply with this assessment at the club at which one McCann was present. Mr. McCann, coming from the club, met Mr. Gerdes, and an altercation occurred between them in regard to the matter, from which it appears that very severe language was used by both parties, and on the same evening Mr. DeBolt and Mr. Kees, two of the subscription committee, went to Mr. Gerdes' house. It is charged that in the controversies which ensued there the defendant used the language stated in the information. They showed the defendant a written notice stating the amount of bonds he was required to purchase. The defendant told them his financial situation, and said that as soon as he could dispose of some corn he expected to buy liberty bonds. They insisted that he borrow money and take his quota of bonds. He declined to do that, and a most violent controversy ensued.

A witness who was sitting on the porch of a house near-by testified that he saw the committee hand defendant a paper and then go with defendant into his house. He could see them in the house through a large bay

window. He saw defendant "sitting there in his rocking chair," and could hear Mr. DeBolt's voice in "a very loud tone." He was questioned, and made answers as follows: "Q. Did you see any motion made there by Mr. Kees? A. Yes, sir. Q. What was that motion? A. Mr. Kees got up and apparently shook his fist at Mr. Gerdes. He had a paper in his hands. Q. Could you tell whether he was mad? A. It appeared very much that way." None of the parties present could tell exactly what any one said, together with the connection in which it was said, and the reply it called forth. Improper things were undoubtedly said in anger, and it is possible that some of the things said and done by each of these three combatants might have operated to obstruct the work of the government, but it is impossible that the members of this committee were aware that there might be such a result from their part in this dispute, or that they intended that there should be. There is nothing to indicate that any one would have supposed that anything the defendant said to these two enthusiastic committeemen was intended by him to obstruct the government in any way, much less that such was in fact the purpose and intent of the defendant in quarreling with the committee in regard to his duty under the circumstances to immediately comply with their assessment. Both parties used violent language, and the facts in evidence and the circumstances of their quarrel all indicate that the defendant was recklessly repelling the imputation of his disloyalty, which was being urged against him because he refused to allow others to dictate how much he would invest in bonds, and when he should purchase them, and how provide the money for that purpose, rather than any intent on his part to obstruct the government in prosecuting the war.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

CORNISH and DEAN, JJ., concurring.

No doubt the committee were actuated by patriotic motives in their transaction with defendant, and it is possible that his language towards them might have been more or less discouraging to them in the prosecution of their work. The case turns on whether he intended to interfere with the efficient prosecution of the war. Here was a man who at the time had two sons in the war and who, the evidence shows, had given financial aid to it. We cannot believe that he wished a German victory. If he did not, he wished the war prosecuted. No amount of malice on his part towards the committee as individuals establishes guilt. He was provoked. He was a Hollander. The presumption would be that he stood for his adopted country. Filial affection and sense of duty would prompt patriotic motives. It is a regrettable circumstance that he was asked if he would not give money for the release of his sons from the army. When asked this question, he promptly answered that he would not. The inquiry had in it a suggestion of disloyalty. It would not be surprising that a man, easily irritated, but with a sense of pride, might at such a time utter words of anger. The *animus* of his language was apparently directed against the personnel of those whom he addressed and not at all against the government.

ROSE, J., dissenting.

I dissent from the ruling of the majority that the evidence is insufficient to sustain defendant's conviction for sedition.

The law of Nebraska declares that if any person, with intent to interfere with the efficient prosecution of the war, shall discourage the lawful raising of funds for the national defense, he shall be deemed guilty of sedition. In the information it is charged in specific terms that defendant, while in conversation with two members of the authorized Beatrice Committee lawfully engaged in soliciting funds for the national defense, applied to that committee vile and profane epithets and sent them word

to "go to hell." There is abundant proof of the truth of this charge as made. There is direct and positive evidence that defendant referred to the committee in the shocking terms described in the information and sent to them the impudent and insulting message of defiance mentioned. The intent to interfere with the efficient prosecution of the war and the discouraging of the committee in lawfully raising funds for the national defense are fair deductions from the conduct and the language of defendant as shown by the evidence. He is chargeable with the intent implied by his acts and words and the jury are the judges of his motives where the evidence is sufficient to establish guilt. If the committee entrusted with the raising of funds for the national defense were subjected to profanity and defiance in the performance of their duties, they would naturally be discouraged within the meaning of the sedition law. With citizens generally assuming the attitude of defendant, who would serve on such a committee? "The lawful raising of funds for the national defense" is what defendant was forbidden to discourage. For the purpose of a conviction under the sedition law the committee were not held to a higher standard of etiquette or ethics than the "lawful raising of funds." The testimony fully justifies the finding of the jury that the work of the committee conformed to the statutory standard. On the record presented, in view of the verdict of the jury and the sentence of the trial court, the conduct of the committee is not open to criticism, and the guilt of defendant as charged in that part of the information accusing him of discouraging the lawful raising of funds for the national defense is established beyond a reasonable doubt.

MORRISSEY, C. J., and LETTON, J., concur in this dissent.

STATE, EX REL. T. J. McGUIRE ET AL., APPELLEES, v. JOHN M. MACFARLAND ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. No. 20502.

1. **Intoxicating Liquors:** NUISANCE: CONSTITUTIONAL LAW. Section 35, ch. 187, Laws 1917, providing for the assessment of $300 against a building (enjoined as constituting a nuisance) and its owner, under a law relating to intoxicating liquors, is unconstitutional, for the reason that the $300 assessment must be regarded either as a tax or as a penalty. If a tax, it violates section 1, art. IX of the Constitution, providing the manner in which revenues may be raised. If a penalty, it violates section 5, art. VIII of the Constitution, requiring penalties to go exclusively to the school fund, and section 6, art. I of the Constitution, guaranteeing the right of trial by jury.

2. ———: ———: LIQUIDATED DAMAGES. Eighty per cent. of the said $300 assessment, being a payment required, not to cover costs, but merely for the wrongful violation of a law which is, in itself, criminal, cannot be considered as a judgment or order for the payment of liquidated damages.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Judgment modified.*

Macfarland & Macfarland, T. J. Keenan and *J. T. Votava,* for appellants.

Clarence A. Davis, Attorney General, T. J. McGuire and *Alfred Munger, contra.*

CORNISH, J.

The defendants, against whom a permanent injunction had issued, for violation of the provisions of chapter 187, Laws 1917, relating to intoxicating liquors, appeared, paid all costs, and gave the bond conditioned upon the immediate abatement of the nuisance. From an order of the trial court, assessing, in addition thereto, a tax of $300, as provided by section 35 of the act, claimed to be unconstitutional, defendants appeal.

Section 35 is as follows: "Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, * * * there shall be assessed against the building and the ground upon which the same is located, * * * and the owner or agent of said premises, a tax of three hundred dollars. The assessment of said tax shall be made by the assessor of the city, village or township in which the nuisance exists. * * * Said tax may be enforced and collected in the manner prescribed for the collection of taxes under the general revenue laws, and shall be a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance; and the payment of said tax shall not relieve the person or building from any other penalties provided by law, and when collected shall be applied and distributed in the manner prescribed by law for the application and distribution of moneys arising from the collection of fines and penalties in criminal cases, excepting that 20 per cent. of the amount so collected shall be paid by the treasurer to the attorney representing the state in the injunction action at the time of final judgment."

In *State v. Fanning,* 96 Neb. 123, 128, considering a like provision, we said: "It is further urged that the act is unconstitutional on account of the inclusion of section 8782, providing for the assessment of a tax of $300 against the property and the ground upon which the same is located, and against the person maintaining the nuisance and the owner or agent of the premises, and the payment of a portion of the tax to the attorney prosecuting the action. This section is a clear and palpable violation of section 1, art IX of the Constitution, and section 5, art. VIII, as well probably as of other provisions of the same instrument, and is void and incapable of enforcement." Afterwards, upon rehearing (97 Neb. 224), mainly because of the reasoning in *State v. Ryder,* 126 Minn. 95, decided in the interim, and because a final determination of the question was not necessary to a

disposal of the case, these words in the opinion and syllabus were withdrawn, and the question left an open one. The Minnesota law is not identical with ours. It denominates the assessment a penalty; ours denominates it a tax. It provides for the application of the money in payment of costs as well as attorney's fees; ours does not make it applicable to the payment of costs. Ours provides, in another section, for payment of costs from sales of the personal property, and provides, further, for the return to the owner of the excess received on sale. Laws 1917, ch. 187, sec. 33. The reasoning in the Minnesota case was directed mainly to the objection that the assessment, being a penalty, was in violation of the constitutional guarantee of the right of trial by jury. The court concluded that under the Minnesota law and Constitution it was a tax, rather than a penalty, and permissible in an equity case, dealing with a nuisance.

The assessment is against the property and person; the law uses the words "other penalties," implying that it is a penalty; it distributes the money in the manner of "fines and penalties in criminal cases," so far indicating that it is in the nature of a penalty. On the other hand, the proceedings for its collection are those appropriate for collection of a tax. The 80 per cent. of it, not going to pay attorney's fees or costs, is punitive in its nature. If we consider it a fine or penalty, then it violates section 5, art. VIII of the Constitution, which provides that "such fines, penalties, and license moneys shall be appropriated *exclusively* to the use and support of the common schools," etc., and also violates the defendant's constitutional right of trial by jury. Const., art. I, sec. 6. *State v. Heins,* 14 Neb. 477.

If we regard the assessment as a tax, then it would seem to be violative of section 1, art IX of the Constitution, which, unlike the Minnesota Constitution, provides the manner in which revenues may be raised by taxation, in words as follows: "The legislature shall provide such revenue as may be needful, by levying a tax

by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct," etc. This revenue would not be so provided. See note to *People v. Smith* (275 Ill. 256) in L. R. A. 1917B, 1075, 1078.

It is urged in the state's brief that the $300 assessment is liquidated damages in the nature of a tax assessed to cover costs, expenses, and to stimulate prosecutions. Is there not something incongruous in the proposition that the state will seek compensation in damages for a mere violation of its laws? Payments exacted by the state in such cases are fines or penalties, and the proceeds must go to the school fund. The commercial aspect of the act is not regarded.

In support of this view, the brief cites *Everson v. State,* 66 Neb. 154, in which the court discusses a statute providing that in cases of conviction for embezzlement a fine or judgment against the party shall be entered, which shall operate for the use of the party whose money or property had been embezzled. The court construed this statute as one providing a judgment for liquidated damages going to the person who suffered injury by the wrongful act. In the instant case, there is no person who has suffered injury. The statute otherwise provides for the payment of its costs. The $300 assessment must be paid, whether or not the owner pays the costs and gives bond, in compliance with the order.

For the reasons above given, the judgment of the trial court is modified so as to exclude the order requiring the defendant to pay the $300 assessment.

MODIFIED.

SEDGWICK, J., not sitting.

LOUIS E. SCHWABE ET AL., APPELLEES, V. AMERICAN RURAL CREDITS ASSOCIATION, DEFENDANT: SAMUEL F. SANDERS ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. No. 20552.

1. **Judgment by Default:** DENIAL OF INTERVENTION. Judgment by default was entered against the corporation in the sum of $24,625, the petition alleging damages in that amount by reason of the sale to the plaintiffs of shares of stock in the amount of $1,400 and a failure upon the part of defendant to make a loan for $14,000. No special damages were alleged. Afterwards, but during the same term of court, certain stockholders intervened, asking that the default judgment be vacated, so that they might file answers setting up certain defenses, and bring in issue the amount of plaintiff's damages. The application of the intervening defendants was denied. *Held*, error.
2. **Appearance, Denial of:** ERROR. Prior to asking the vacation of the judgment, the intervening stockholders, in behalf of the corporation, and during the term at which the default judgment was entered, made special appearance, objecting to the jurisdiction of the court over the defendant, for want of notice, no summons having been served upon any officer or agent of the corporation. The special appearance was overruled. *Held*, error.
3. **Corporations:** FOREIGN CORPORATION: SERVICE OF SUMMONS. At the time of commencing action, the defendant, a foreign corporation, had never domesticated itself within this state; it was not at the time doing business in this state; nor had it ever filed with the state auditor written authority for him to accept service for it. A service of summons upon the deputy state auditor, who never forwarded a copy of the summons to the foreign corporation and was under no duty to forward it, would not constitute service upon the corporation.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

E. D. Crites and *F. A. Crites*, for appellants.

George W. Plantz and *William P. Rooney, contra.*

CORNISH, J.

The plaintiffs subscribed for stock in the defendant American Rural Credits Association, a Delaware corpo-

ration, organized for the purpose of engaging in the mortgage loan business on the amortization plan, similar to that of federal land banks, and gave their note therefor in the sum of $1,400, which note was sold to the Citizens State Bank of Chadron. Later the bank recovered a judgment for $1,550.26 on the note, which judgment the plaintiffs paid. Shortly afterwards the association ceased to do business in this state. Thereupon plaintiffs brought suit against the association in Dawes county, claiming to have been damaged in the sum of $24,192, on account of the sale of the stock to them, and because of its failure to make a loan to the plaintiffs in the sum of $14,000, which was provided for in the agreement wherein the plaintiffs subscribed for the stock. Judgment upon default was had against the association in the sum of $24,625. Afterwards, but during the same term of court, certain stockholders in the defendant corporation attempted to intervene for the protection of their rights. They first made a special appearance for the purpose of objecting to the court's jurisdiction to enter judgment against the defendant for want of notice. This special appearance being overruled, they appeared specially, asking leave to intervene, and that the judgment be vacated for reasons set forth in their affidavits. This special appearance being overruled, the interveners again moved the court to set aside the judgment by default, so that the interveners, stockholders, could intervene and make defense to the suit for reasons specified in their accompanying affidavits, which motion was overruled. The affidavits point out that the basis of plaintiffs' action is damages accruing to them in the payment of $1,400 for shares of stock; that no special damages are alleged in the petition, and that it is impossible that the plaintiffs could have been damaged in the sum of $24,625 by reason of such payment for stock; that as stockholders interveners are interested in the subject-matter of the action; and that they had no notice of the action until default judgment was entered. The affidavits

contain statements of fact to show that no sufficient notice was ever given to the corporation; that the corporation has failed to make an appearance in the suit against it; and that there is no person to whom the objecting stockholders can apply to make a defense, if they are not admitted for that purpose.

In this ruling, last above mentioned, we are of opinion that the trial court erred. It would seem impossible that the plaintiffs could have suffered damages in the sum of $24,625 by reason of the purchase of shares of stock amounting to $1,400 and failure of the association to make the loan. The interveners, as stockholders of the corporation, had a right to intervene for their own protection as stockholders. Their motion was made during the term in which the default was entered, and we are of opinion that it was an abuse of the trial court's discretion to refuse to set aside the judgment and permit the intervening stockholders to contest the amount of plaintiffs' damages and make other defenses. *Hyde v. Kent,* 47 Neb. 26; *State v. Holmes,* 60 Neb. 39; *Cobbey v. Wright,* 23 Neb. 250; *Bradley v. Slater,* 58 Neb. 554; *Coates v. O'Connor,* 102 Neb. 602.

The court should also have entertained and sustained the interveners' special appearances, objecting to the jurisdiction of the court to enter judgment. Stockholders, for their own protection, were entitled to have the corporation legally in court, if at all. Three summonses were issued: one to the sheriff of Douglas county, which the sheriff returned, stating that he did not find the defendant in his county; that Mr. Odell, then secretary of the federal land bank, stated to him that he had not been an officer of the company since July, 1916, and that he did not doubt Odell's word. Afterwards the sheriff made another return of service entitled "Sheriff's Amended Return to Comply with Order of Court," in which he undertakes to make service upon Frank J. Odell, as secretary of the corporation, at room 701, W. O. W. building. The facts are that this room never was the

office of the defendant association, and Frank J. Odell was not at the time an officer or agent of the association.

Another summons was issued to the sheriff of Dawes county, which was served upon one W. A. Carmean, as an officer or agent of the association. In fact, he was not and never had been such an officer or agent that service could be had upon him. He was an officer of the bank which purchased the note given by the plaintiffs, and put in judgment.

The third and last summons was issued to the sheriff of Lancaster county. The return shows service upon the deputy state auditor. The deputy state auditor did not send copy of the summons to the defendant corporation, but returned it to the clerk of the district court, with a letter stating that service could not be made upon him for the reason that the corporation had never domesticated itself within the state. At the time service was attempted the association had never domesticated itself; it had never filed the written authority which the law requires, authorizing the auditor to accept service for it; and, furthermore, as the record shows, it was not at that time, and had not been for a long period prior thereto, attempting to do business in this state, but had quit the state. Whether a service upon the deputy state auditor is a compliance with the law requiring a service upon the auditor, it is not necessary to decide, because the service attempted in this case would, in no event, be sufficient. A copy of the summons was not forwarded to the association by the auditor. No duty was upon the auditor to forward it; nor does the record show facts from which a presumption of notice, or estoppel to deny notice, could arise. *Poeggler v. Supreme Council, C. M. B. A.*, 102 Neb. 608.

REVERSED.

LETTON, J., concurs in the conclusion.

LOUIS E. SCHWABE ET AL., APPELLEES, V. AMERICAN RURAL CREDITS ASSOCIATION, DEFENDANT: SAMUEL F. SANDERS ET AL., APPELLANTS.

FILED DECEMBER 15, 1919. No. 20903.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

E. D. Crites and *F. A. Crites,* for appellants.

George W. Plantz and *William P. Rooney, contra.*

CORNISH, J.

This case was argued and submitted in connection with *Schwabe v. American Rural Credits Ass'n, ante,* p. 46, in which judgment was recovered against the American Rural Credits Association in the sum of $24,625. The same plaintiffs sue the association and various stockholders for the recovery of personal judgments against them, for the satisfaction of the judgment recovered. The ground of the action is that the corporation had not complied with the provisions of the Nebraska statute, requiring domestic corporations to make and file annual statements and copy of resolutions. Rev. St. 1913, secs. 549, 577, 586.

In *Schwabe v. American Rural Credits Ass'n, ante,* p. 46, we have held that the judgment must be reversed and the cause remanded. Inasmuch as the plaintiff's right of action in this case depends upon their having exhausted their legal remedy, it follows that our decision, reversing the judgment in the other case, must work a vacation of the judgment appealed from in this case and dismissal of the action. *Wehn* v. *Fall,* 55 Neb. 547; *Globe Publishing Co. v. State Bank of Nebraska,* 41 Neb. 175.

It is admitted that all of the 37 defendants, except Odell, Talmadge and Lawson, were stockholders only,

having no voice or share in the management of the corporation. It would seem from the record that these stockholders were innocent holders of stock who had subscribed therefor under the same circumstances and conditions as the plaintiffs, who were also stockholders in the corporation. Assuming this to be true, it follows that the plaintiffs would have no right of action against these defendants for failing to comply with the Nebraska law, regulating the formation and management of the corporation. *Singhaus v. Piper,* 103 Neb. 493.

The American Rural Credits Association was a Delaware corporation, not domesticated. It would seem that the liability of stockholders in it would be fixed by the Delaware, and not by the Nebraska, law.

For the reasons above given, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON, J., concurs in the conclusion.

STATE OF NEBRASKA V. EDWARD K. MURRAY.

FILED DECEMBER 15, 1919. No. 20556.

1. **Constitutional Law:** SUNDAY LABOR ACT. Chapter 234, Laws 1917, is not discriminative class legislation by reason of the fact that it imposes upon barbers a more severe penalty for working at their trade on Sunday than that imposed by the general Sunday act, namely, section 8802, Rev. St. 1913.
2. **Sunday Labor Act:** PENALTY. Under the police power the legislature may impose such reasonable penalty for a violation of the Sunday law as it may deem reasonably necessary to make the act effective.
3. ———: BARBER SHOPS. It is within the province of the legislature to provide by law that keeping barber shops open on Sunday is not a work of necessity.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Brown, Baxter & Van Dusen, for plaintiff in error.

Willis E. Reed, Attorney General, Orville L. Jones, Mason Wheeler and *George A. Magney, contra.*

DEAN, J.

Edward K. Murray was convicted and fined $10 and costs in police court under a complaint charging that, in Douglas county, he, "being a barber, working as such in the barber shop of the Hotel Fontenelle, did then and there on Sunday, July 29, 1917, barber one John Doe, * * * the said John Doe, real name unknown, being at the time of said barbering a guest at the Hotel Fontenelle."

On appeal a jury was waived, and the case being tried to the court on a stipulation of facts, the judgment was affirmed by the district court. Defendant prosecutes error.

The stipulation follows: "(1) The defendant, Edward K. Murray, is a barber by profession, and as such was on Sunday, the 29th day of July, 1917, in the employ of the Interstate Hotel Company, then operating the Hotel Fontenelle in the city of Omaha, Douglas county, Nebraska; that the said defendant on said day and time and place, and in the barber shop owned and operated by said hotel company in said hotel company's building, did barber one Harry C. Lefler under direction of said hotel company.

"(2) That said Lefler at said time was a guest of said Hotel Fontenelle, having arrived late the night before from some distant point in another state; that when said Lefler, guest of said hotel, came into the barber shop and demanded services, he was in necessary need of barbering in order to be comfortable and healthy and in order to make himself presentable in appearance and acceptable to the other guests of the hotel in the dining room and lobby thereof; that said Hotel Fontenelle has a capacity to entertain more than 300 guests at a time, and on or about the date mentioned above there

were several hundred other guests in said hotel; that in the city of Omaha and in the state of Nebraska, there are a great many other hotels of large capacity maintained and operated on the same high plane as the Hotel Fontenelle and which are patronized by the traveling public especially in large numbers, who likewise maintain and operate in connection with said hotel business barber shops for the accommodation, comfort and health of their patrons; that the traveling public stopping at said hotel expect and demand on Sunday, as well as week days, tonsorial attention and service as well as bed and board accommodations; that a very large per cent. of said patrons are commercial travelers and solicitors, who, during the week, have pursued their business in other parts of the state, and who are in the habit of coming to Omaha to spend Sunday at the Omaha hotels, and who usually arrive on the late Saturday night or early Sunday morning train, and whose health as well as comfort requires tonsorial care and attention; that a very large per cent. of said patrons are without proper equipment for shaving themselves, and of course are physically unable to cut their own hair or treat themselves with either electric or other massage."

Defendant argues that the barber act, namely, chapter 234, Laws 1917, is not applicable to the facts; that it is "class and special legislation," that "it discriminates against barbers and in favor of other common laborers by imposing on barbers a severer penalty than that imposed by the general Sunday act on other common laborers, and is therefore unconstitutional." The "general Sunday act" referred to imposes a fine "not exceeding $5 nor less than $1" for working on Sunday "at common labor, work of necessity or charity only excepted." Rev. St. 1913, sec. 8802.

Section 1 of the act in question, so far as applicable, provides: "It shall be unlawful for any person," his agents or servants, "to conduct, carry on or to perform

any of the services of a barber on the first day of the week, commonly called Sunday, provided that the services of a barber shall be defined as common labor and shall not be construed as being a work of necessity or charity, provided that where such services shall be done in connection with the medical treatment of persons confined to their rooms or in a hospital and being under the care of a physician, the same shall be construed as a work of necessity." Section 2 fixes a fine of $10 for the first offense and "not less than fifteen ($15.00) dollars or more than fifty ($50.00) dollars or by imprisonment in the county jail for not to exceed thirty (30) days for the second and subsequent offenses."

We do not think the act will bear the construction contended for by defendant. It applies equally to all of the members of a certain class, namely, the barbers of the state, and it seems to be a reasonable exercise of the police power. Under this power the legislature in its discretion may impose such reasonable penalty as will apply to all the members of any given class of persons, for working on Sunday as it may deem reasonably necessary to make the act effective. Statutes similar to ours that inflict a heavier penalty for barbering on Sunday than is imposed on other classes of labor for violation of the general Sunday acts have been held constitutional. *Breyer v. State,* 102 Tenn. 103; *Stanfeal v. State,* 78 Ohio St. 24; *People v. Bellet,* 99 Mich. 151. In the Michigan case the subject is discussed at some length. The court aptly said:

"It is conceded that the state, in the exercise of its police power, has the right to enact Sunday laws, and that it also has the right to provide for the regulation and restriction of those engaged in an employment which, in and of itself, may prove harmful to the community, such as the liquor traffic. But it is contended that the business of conducting a barber shop is not of this class, and that it is in the nature of class legislation to prohibit this business under more severe penalties than

those provided for the conduct of other legitimate business on Sunday. We do not deem the act in question open to such objection. By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another *in like case* offending."

Cooley, Constitutional Limitations (7th ed.) 554, is cited in support of the text.

Defendant argues too that, in view of the stipulation which provides that Lefler "was in necessary need of barbering in order to be comfortable and healthy," this made the barbering a work of necessity. We do not think so. Lefler was barbered in the barber shop. Under the agreed statement of facts he did not come within the class of persons who are excepted from the operation of the statute and for whom the services of a barber may lawfully be performed "in connection with the medical treatment of persons confined to their rooms or in a hospital and being under the care of a physician." If any of these conditions had obtained, the barbering, under the express terms of the act, would, of course, be construed to be a work of necessity. It will not be presumed that the legislature by this act intended to make it a crime in a case of emergency to cut the hair or to remove the beard of a person who has sustained injuries about the head or face and for whose proper treatment such services are required. The facts stipulated do not present a case of that kind.

Defendant's contention that it is not within the province of the legislature to define what is a work of necessity or charity does not seem to be well founded. In *Petit v. Minnesota,* 177 U. S. 164, the supreme court of the United States commented on and approved this language found in the Minnesota opinion: "In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops

open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

We do not find reversible error. The judgment is

AFFIRMED.

ROSE, J., dissents.

RED NEAL V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21089.

1. **Witnesses:** CROSS-EXAMINATION. An accomplice who consents to testify on the part of the state cannot be compelled, upon the cross-examination, to testify as to whether he participated in the commission of a crime that is not connected with the offense for which the defendant is being tried.
2. **Criminal Law:** EVIDENCE: DECLARATIONS OF CONSPIRATOR. Where it is shown that a conspiracy was formed to commit a series of crimes, the declarations of one of the conspirators during the existence of the conspiracy are admissible in evidence, although such declarations were made after the commission of the crime for which the defendant is being tried.
3. ———: INSTRUCTIONS. It is not incumbent on the court to inform the jury that defendant introduced no evidence to overcome or to explain the state's evidence.
4. ———: WITNESSES: CREDIBILITY: QUESTION FOR JURY. It is the province of the jury to pass upon the probative value of the testimony of a witness notwithstanding the jury may believe that such witness has wilfully sworn falsely in regard to a material matter.
5. ———: ABETTOR. One who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abettor or procurer within the meaning of section 8579, Rev. St. 1913. *Lamb v. State*, 69 Neb. 212.
6. ———: INSTRUCTIONS. Section 9114, Rev. St. 1913, is substantially complied with when the jury is informed that, even though the defendant has not availed himself of the privilege of testifying in his own behalf, such failure to testify should not be taken as creating a presumption against him.
7. ———: ———. Error cannot be predicated upon a refusal by the court to give an instruction requested by defendant when in another instruction the jury is correctly informed respecting the points covered by defendant's requested instruction.

8. **New Trial:** NEWLY DISCOVERED EVIDENCE. "A new trial should not be granted a party on the ground of newly discovered evidence, unless he makes it appear that the newly discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." *Cunningham v. State*, 56 Neb. 691.

9. **Criminal Law:** EVIDENCE: OTHER ACTS. "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." *Clark v. State*, 102 Neb. 728.

10. ———: ———: OBJECTIONS. An objection that certain evidence offered is "incompetent, irrelevant and immaterial" is not necessarily sufficient to require its exclusion on the ground that there is not sufficient foundation for its introduction.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Ernest F. Armstrong, Kelligar & Ferneau and *Albert S. Ritchie*, for plaintiff in error.

Clarence A. Davis, Attorney General, and *A. V. Shotwell, contra.*

DEAN, J.

In the district court for Douglas county it was charged that, on or about September 28, 1918, defendant "did feloniously procure, incite, abet and aid" W. J. McKenna and L. C. Jones in the "felonious stealing, taking, moving and driving away" of an automobile touring car, the property of C. J. Tamulewicz, of the value of $1,145.

Defendant was convicted and prosecutes error.

Both McKenna and Jones pleaded guilty and voluntarily testified on the part of the state. About a month after the Tamulewicz car was stolen McKenna was informed against and charged in the same court with stealing another automobile known as the Judson car. On the cross-examination in the present case he was asked respecting the Judson car: "Q. Did you or did you not steal it? * * * A. I am not here to perjure myself, and I will not incriminate myself." The court sustain-

ed McKenna in his refusal to answer. This was not error. In *Pitcher v. People,* 16, Mich. 142, in an opinion by Judge COOLEY, the court say: "When an accomplice consents to be used by the prosecution as a witness, while he is compelled, on cross-examination, to testify fully concerning the transaction under investigation, he cannot be forced to testify as regards his criminality in other cases."

Defendant complains because Mrs. Bowles was permitted to relate the substance of certain damaging admissions made to her by McKenna after the theft of the Tamulewicz car, in which he implicated Neal and another. This was not error. "Where the conspiracy contemplates a series of crimes, acts and declarations of a conspirator during the existence of the conspiracy, although after the commission of the specific crime for which defendant is on trial, are admissible." 16 C. J. 663, sec. 1319.

Defendant did not avail himself of his privilege to testify, and with the exception of one witness who testified briefly and not at all as to the merits, no testimony was offered on his behalf. He now argues that an instruction requested by him containing this language should have been given: "Even if he introduced no evidence at all to overcome or explain that against him, the jury should acquit him, unless the evidence introduced by the state satisfies you, beyond a reasonable doubt, that he is guilty as charged in the information." We do not agree. The jury was correctly instructed on reasonable doubt. It was not incumbent on the court to inform the jury that defendant introduced no evidence to overcome or to explain the state's evidence. *People v. Hummel,* 104 N. Y. Supp. 308; *State v. Hogan,* 115 Ia. 455.

Defendant complains because this requested instruction was refused: "You are instructed that if a witness, who was an accomplice of the defendant, has wilfully sworn falsely in regard to a material matter upon the

trial of this case, the evidence of such accomplice is not sufficient to sustain a conviction of the defendant, unless such evidence is corroborated by other evidence." In this ruling error was not committed. It is one of the functions of the jury to pass on the probative value of such testimony. 16 C. J. 695, sec. 1422, and p. 957, sec. 2342.

Exceptions are taken to instructions 7 and 8. Defendant argues: "The giving of these instructions was error because they stated to the jury that, if Neal agreed with others to a common plan to procure, aid and abet McKenna and Jones, and in pursuance of such plan the Tamulewicz car was stolen, that would be sufficient to convict. An aider or abettor must be actually or constructively present at the commission of a felony." We do not think defendant's argument is tenable. One who incites or instigates the commission of a felony when he is neither actually nor constructively present is an aider, abettor or procurer within the meaning of section 8579, Rev. St. 1913. *Lamb v. State,* 69 Neb. 212; *Skidmore v. State,* 80 Neb. 698.

In the instruction numbered 9 the jury were informed, among other things, that "a person charged with the commission of a crime is a competent witness in his own behalf, but the fact that he has not availed himself of such privilege should not be taken by you as creating a presumption against him." Defendant argues: "Under our statute (Rev. St. 1913, sec. 9114), defendant is not a competent witness unless he requests so to be, and to say that he is without modification is error." The exception is technical and appears to be without substantial merit. The court modified the instruction by informing the jury that "the fact that he has not availed himself of such privilege should not be taken by you as creating a presumption against him." The statute was substantially complied with.

Defendant complains of the court's refusal to give his offered instruction numbered 9. The court did not err

in its ruling, because every element in the requested instruction is covered in another instruction wherein the jury is informed that before they could find defendant guilty they must be satisfied beyond a reasonable doubt that McKenna and Jones stole the car in question, and that prior to the stealing defendant procured, incited, abetted and aided McKenna and Jones in the theft.

Defendant requested an instruction, which was refused, informing the jury that he was charged with being an accessory before the fact and defining the elements that constitute that offense. Error cannot be predicated on this assignment. The instruction on inciting, abetting and aiding as given sufficiently covers these points. *Guignon v. State,* 101 Neb. 587.

Defendant's motion for a new trial on the ground of newly discovered evidence was denied. The information was filed January 21, 1919, charging the offense as having been committed on or about September 28, 1918. The case was tried 40 days thereafter. The affidavits are mainly to the effect that defendant was unable in that time to establish his whereabouts on September 29, 1918. We think due diligence was not shown. It was not an abuse of judicial discretion to overrule the application. *Cunningham v. State,* 56 Neb. 691.

Defendant argues: "It was error to receive in evidence the matter touching the dealings of the principal parties with the 'Buick Roadster' on any theory. This testimony detailed the commission of an independent and dissimilar crime committed at a date prior to the instigation or conception of the agreement relied upon by the state, to convict the defendant of the crime charged in the information." The evidence respecting the sale of the stolen Buick roadster to defendant and another, with knowledge by the purchasers that the car was stolen, was properly admitted as tending to show the formation and existence of a general plan and conspiracy to steal cars and sell them, in which plan the state contended defendant was an active participant.

Clark v. State, 102 Neb. 728; *St. Clair v. State,* 103 Neb. 125; *State v. Dobbins,* 152 Ia. 632; *State v. Monroe,* 142 Minn. 394.

Defendant argues that the jury should have been instructed respecting the limited purpose for which the testimony in the matter of the Buick roadster was admitted. It seems to us that instruction numbered 8, when considered altogether, plainly informs the jury that the defendant was "not charged with stealing the Buick or any other car, nor with receiving stolen property," but that such evidence was for the purpose of showing an unlawful plan or conspiracy by defendant and others to steal automobiles and to dispose of them.

Defendant finally argues: "It was error to receive the testimony of Mrs. Dorothy McKenna concerning the alleged conversation with one Maurice, without having laid a proper foundation connecting the defendants, or one of them, with such conversation." No objection was made on the ground that there was not sufficient foundation for its introduction. The objection was that the testimony was "incompetent, irrelevant and immaterial." The better rule seems to be that this stock objection does not sufficiently challenge the court's attention to the point in question. *Crocker v. Carpenter,* 98 Cal. 418; 1 Wigmore, Evidence, sec. 18; 38 Cyc. 1382. To hold the objection sufficient as made, would cast an unreasonable burden upon the court in a protracted trial. It has been aptly said: "Certainly it is not fair to allow such a general dragnet as 'incompetent, irrelevant, and immaterial' to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the court's attention, might have been avoided or corrected." *Sigafus v. Porter,* 84 Fed. 430.

Finding no reversible error, the judgment is

AFFIRMED.

MORRIS KATLEMAN V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. No. 21100.

1. **Criminal Law:** EVIDENCE: OTHER ACTS. "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." *Clark v. State*, 102 Neb. 728.
2. ———: ———. The opinion of an expert as to the effect of the use of a narcotic on the credibility of a witness is not admissible in evidence.
3. ———: VERDICT: IMPEACHMENT. "Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors." *Iman v. Inkster*, 90 Neb. 704.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Benjamin S. Baker, for plaintiff in error.

Clarence A. Davis, Attorney General, W. W. Slabaugh and *A. V. Shotwell, contra.*

DEAN, J.

This is a companion case to *Neal v. State, ante,* p. 56, in which a decision rendered at this sitting affirms a judgment of conviction for a felony. Defendant Katleman was informed against jointly with McKenna, Jones and Neal. Both Katleman and Neal were given separate trials. The information charges that defendant "feloniously did procure, incite, abet and aid" W. J. McKenna and L. C. Jones in the "felonious stealing, taking, moving and driving away" of an automobile touring car, the property of C. J. Tamulewicz, of the value of $1,145. Defendant was convicted and prosecutes error.

Virgil Ott is a 17-year-old boy whose residence is at Wichita, Kansas. He testified that he was introduced to Katleman at Omaha, on Sunday, September 22, 1919, by a taxi-cab driver, and that he there told Katleman he had stolen a car at Hutchinson, Kansas, that he want-

ed to sell, to which Katleman replied that he would take care of the car for him. Ott said that on Monday following Katleman and Neal, both being present, bought the car from him for $75, and that, pursuant to their instruction, he took the car to Nebraska City and there delivered it to a designated garage. Defendant says that the testimony of Ott was prejudicial error because it did not "connect in any manner either McKenna or Jones with the transaction." He argues: "The general rule is that, on the prosecution for one crime, evidence which shows or tends to show the accused committed a crime independent of that for which he is being tried although a crime of the same sort, is inadmissible and reversible error. * * * We are not unmindful that there are exceptions to this rule."

The objection does not seem to be well founded. The scheme employed by defendant and Neal in obtaining and disposing of the Ott car was substantially the same general plan and scheme as that employed by Neal and defendant in obtaining and disposing of the Tamulewicz car and other stolen cars received from McKenna and Jones. On this point the court instructed the jury that defendant was "not on trial for any connection he may have had with the transaction involving the car from Hutchinson, Kansas," and that the evidence of Ott should be considered "only upon the question whether or not a conspiracy, design, plan or scheme existed to aid, abet or incite McKenna and Jones (mentioned in the information) to steal automobiles, and, if so, whether defendant Katleman had knowledge of such conspiracy, design, plan or scheme." We think the circumstances of the present case come within the rule announced in *Clark v. State,* 102 Neb. 728. To the same effect are: *St. Clair v. State,* 103 Neb. 125; *State v. Dobbins,* 152 Ia. 632; *State v. Monroe,* 142 Minn. 394.

L. C. Jones is one of the codefendants who pleaded guilty and voluntarily testified on the part of the state. Testimony was introduced tending to show that this wit-

ness was addicted to the use of morphine and other narcotics. Defendant assigns as error the court's refusal to permit expert testimony to establish the fact that the use of such drugs tends to render a person unreliable in his statements and generally untruthful. This assignment of error cannot be sustained. In *State v. King*, 88 Minn. 175, a like question was involved. The court aptly said: "Defendant offered to show on the trial that a witness called by the state was a confirmed user of opium, had been addicted to its use for years, and that such use renders the person unreliable in his statements and prone to falsehood. The evidence was excluded by the trial court, and the ruling is held not error. The witness was before the court and jury. His appearance, demeanor, and the manner in which he gave his testimony, whether straightforward and unequivocal, or in a manner indicating untruthfulness or an unbalanced mind, were sufficient from which his credibility could be determined."

In his motion for a new trial defendant charges that the verdict was rendered under the influence of passion and prejudice, and in support of his contention he offered the affidavits of certain of the jurors. "Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors." *Iman v. Inkster*, 90 Neb. 704. The evidence supports the verdict.

We do not find reversible error. The judgment is therefore

AFFIRMED.

PLYMOUTH CORDAGE COMPANY, APPELLANT, V. DAVID S. PHELPS ET AL., APPELLEES.

FILED DECEMBER 15, 1919. No. 20500.

1. **Sales: IMPLIED WARRANTY.** A manufacturer of goods, who prepares them to be sold, either through himself or through others, impliedly warrants that the goods sold are reasonably fit for the

purpose for which they are sold, and that they are free from any latent defect growing out of the process of manufacturing.

2. ———: LATENT DEFECT: EVIDENCE. Evidence examined, and *held* proper to be submitted to the jury as bearing upon the question whether the goods sold were possessed of a latent defect growing out of the process of manufacture.

APPEAL from the district court for Webster county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

Burkett, Wilson & Brown and *Fred Maurer,* for appellant.

F. J. Munday, contra.

ALDRICH, J.

Plaintiff brought this action at law to recover the purchase price of a carload of binding twine sold by it to the defendants in the year 1914. The verdict of the jury was for the defendants. The plaintiff brings this action on appeal. The contract of purchase was made by correspondence between the parties. The twine may be designated as Plymouth standard twine.

Plaintiff was the manufacturer of the twine. Defendants were merchants at Bladen, who handled the twine in distributing it to the farmers in the vincinity of this village. Total amount purchased by the defendants from the plaintiff was 25,000 pounds of what is know as Plymouth standard twine. Plaintiff claims that there is due him, for twine sold and delivered, from the defendants, and each of them, the sum of $1,875, and interest at 6 per cent. from October 1, 1915. The defendants in their answer make counterclaim for $5,000, alleging, among other things, in substance, that this twine in controversy was defective and worthless for the purpose for which it was purchased.

The principal issue in this case, and around which everything else centers, is: Was there an implied warranty as to the quality, grade, workmanship, and material furnished in making this twine?

Plaintiff claims that the twine in question, which was purchased and used by defendants in 1915, was manufactured in the same way and was of the same quality and the same material as that made in 1914; the characteristics of standard twine, in substance, are its texture—500 feet to the pound—uniform strength, and a general quality that makes it insect proof; that no guaranty was ever made in that respect; while the record shows conclusively that the twine was eaten and gnawed by insects to the extent that a very large proportion of the grain went to pieces; in many instances as high as 18 bundles out of 20 would be unbound and the twine eaten off by insects.

These facts being proved by a clear, undisputed weight of evidence, the jury on the facts found for the defendants. The defendants take the position that there was an implied warranty in the purchase of this twine; that it was first-class quality and would perform and do the things for which it was purchased. The plaintiff knew the purpose for which the twine was to be used.

The court has recognized the doctrine of implied warranty, and in many cases has held that, where an article was worthless for the specific purpose for which it was bought, it has laid down the rule that there is an implied warranty that "the article supplied shall be reasonably fit for the purpose for which it is sold." *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689. The evidence upon the proposition is overwhelming that a large amount of the grain, when it came to be placed in stacks, was unbound, or the bundles became unbound immediately upon touching them; that the same twine, black in color, was different in quality from other standard twines used in binding grain.

The jury, then, on the evidence, rendered the only verdict it could render. This court has said: "Ordinarily where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, for a particular purpose, of which he is aware, under

such circumstances that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the article supplied shall be reasonably fit for the purpose for which it is sold." *Toledo Computing Scale Co. v. Fredericksen, supra.* It follows there must be an implied warranty.

It seems to be the general rule of this court that, in regard to implied warranty, the article sold is supposed to be generally expected to do the thing for which it is sold. This doctrine is reiterated in the case of *Underfeed Stoker Co. v. Farmers Co-operative Creamery & Supply Co.,* 98 Neb. 377. The same doctrine is again reiterated in *Oxygenator Co. v. Johnson,* 99 Neb. 643; and again in the case of *Hoe v. Sanborn,* 21 N. Y. 552, 78 Am. Dec. 163. The New York court announced back in 1860 in the matter of an implied warranty: "A manufacturer, who sells goods of his own manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture." This is substantially the same doctrine reiterated in *Toledo Computing Scale Co. v. Fredericksen, supra;* 24 R. C. L. 178, sec. 451; *Gerst v. Jones,* 32 Grat, (Va.) 518, 34 Am. Rep. 773.

It is recognized as a universal doctrine, founded on plainest principles of justice, that whenever an article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect if he fails to disclose his knowledge on the subject at the time of sale. It seems to be the general doctrine that, whenever a manufacturer of goods prepares his articles to be sold, either through himself, or through others, a warranty should be implied. In *Bluett v. Osborne,* 1 Stark. (Eng. C. Law) *384, Lord Ellenborough said: "A person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is sold." *Gray v. Cox,* 4 Barn. & Cr. (Eng.), *108. Best, C. J., reiterated the doctrine in *Jones v. Bright,* 5 Bing. (Eng.) 533, and it has been reiterated by many juris-

dictions in this country. The implied warranty is merely an obligation which the law imposes upon principles foreign to the actual contract, but which principles really are strictly analogous to the original contract.

Now the plaintiff claims that he sold to the defendants a twine known as "standard twine," and which was represented to be of certain qualities and characteristics. Granting this to be true, we do not understand that as a matter of law, or fair dealing, he could sell this kind of a standard twine and represent it to be of merchantable quality, and still have it turn out to be of no use for the purpose for which it was bought. Certainly there is an implied warranty that the article shall be of the kind and quality as represented. 35 Cyc. 403. See, also, *Loxtercamp v. Lininger Implement Co.*, 147 Ia. 29, where the principle is laid down: "Where a dealer undertakes to furnish an article to fill an order from one who buys for resale, or for any other known or specified use, or where there is an executory contract of sale of personalty not present for inspection and delivery, there is an implied warranty that the property is of merchantable quality, and, if a product of manufacture, that it is well made, of good material, and reasonably well fitted for the uses for which it is constructed."

It could not be told by the defendants whether these goods were free from any latent defect until they had been passed out, and then, for the first time, it would be discovered whether this twine in question was fit to bind grain or not, and on the overwhelming evidence it appears of record that it was worthless for the purpose for which it was bought. The rule is laid down that where any dealer undertakes to furnish an article to accomplish a specific purpose, and that is the consideration of the sale, there is an implied warranty that follows such sale, and calls upon the author of the promise to make good. The trial court adopted the rule of law as laid down in the *Lininger Implement Co.* case, *supra,* and submitted to the jury whether or not the

facts in the case created an implied warranty. Upon that issue of fact, and this case is largely one of fact rather than of law, the jury found its verdict for the defendants and against the plaintiff. There are other issues raised, but this one issue on the question of implied warranty is so overwhelming, and is so far reaching, that it permeates this entire case, and is really decisive of it.

There was some evidence by alleged experts as to there being no warranty against damages by grasshoppers and other insects. It was the theory of the plaintiff that the damage caused was by insects, and that there was no process of manufacture that prevented or tended to prevent the ravages of these grasshoppers and crickets. It would seem that, while these witnesses were men of unusual information, yet they had no knowledge as to the chemical qualities that entered into the manufacture of this twine. All that they seemed to know was from observation. They had never made any study or analysis of the constituent elements that entered the making of the twine in question. And the weight of their testimony was a matter for the jury alone. The trial judge deemed the proposition as one of the theories of plaintiff's case and fairly submitted it to the jury for their consideration, for he plainly tells them that, "If from the evidence you find that the cutting of the twine by insects was through some cause which did not arise from any defect in the quality, texture or method of manufacture of the twine in question, * * * then you are instructed that the defendants are not entitled to recover anything upon the issue of a breach of warranty." There can be no question but what this instruction fairly submits the theory of the plaintiff, and on this fact the jury found for the defendants.

Hence, we conclude that under the facts and all the evidence and the law as applied the judgment of the district court should be affirmed.

AFFIRMED.

SEDGWICK, J., dissents.

DELLA M. DODDER, APPELLANT, V. ÆTNA LIFE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 15, 1919. No. 20626.

1. **Appeal:** AFFIRMANCE. Where the probative force of the evidence is so strong that the jury would not be justified in rendering any other verdict, this court will not disturb the same.
2. ———: ———. Where the verdict announced by the jury was the only one permissible under the law and evidence, the judgment will be affirmed, and in such case errors occurring at the trial were not prejudicial.
3. **Insurance:** BURDEN OF PROOF. In suit on an accident insurance policy, the burden of proof is upon the plaintiff to show that death was accidental.
4. **Evidence:** DEATH BY SUICIDE: PRESUMPTION. "The presumption against death by suicide is *prima facie* only and rebuttable. It prevails when the cause of death is unknown. It does not prevail as a presumption in the presence of facts bearing upon the question whether death is intentional or accidental." *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

A. S. Churchill and *Byron G. Burbank,* for appellant.

Gurley & Fitch, contra.

ALDRICH, J.

Plaintiff sues defendant insurance company to recover on one certain accident insurance policy in the sum of $15,000, growing out of the death of Edward L. Dodder, which took place about six or seven miles northwest of Florence in Douglas county, on the evening of January 4, 1917.

The record discloses that death was caused by a gunshot wound. It appears the bullet entered Dodder's head at the right temple and came out slightly above and back of the left ear. Mr. Dodder was found sitting behind the steering wheel of his Cadillac coupé with the lights

out, brake set, his head dropped slightly to the right, his hat on the seat beside him.

The car was a three-passenger, left-hand drive coupé with the usual glass inclosures. From the condition of the car it appears there was no shot from the outside, and no mark from the inside of any penetration by a bullet or other missile. Glass and woodwork were intact. The steering wheel had a mechanism which enabled the driver to adjust the same to his size and to get in and out of the car through either door. Blood had flowed from the bullet wound in the head down on the seat of the car and from there to the floor, and thence trickled through the car, staining the snow underneath. Cigar ashes were upon the front of the clothing of the deceased.

Dodder's position in the car was one of quiet undisturbed repose; there was no evidence of any struggle, as appeared from his position and the condition of his clothes. Lying on the floor of the car, which was covered with blood, was a partially smoked cigar. Dodder's feet were on the floor opposite the brake. Back of the clutch, lying at his feet, was a six-shot 38-caliber Colt's revolver, loaded with long cartridges, one of which was exploded. Dodder owned a Colt's revolver similar to the one found in his automobile. The revolver owned by Dodder does not appear to have been found, but if this one found in his car was not his, it certainly answered its description. Later a long-38 caliber lead bullet with blood upon it was found imbedded in the dirt near where the car had stood.

The scene of this tragedy was staged midst the hills on a sparsely traveled by-road about 200 yards off the main road running north and south from Florence. The ground was covered with snow which had lain there several days. The only wheel tracks near the automobile were those of a farm wagon, and the wagon of the rural mail carrier, who was first to discover Mr. Dodder sitting in his car, dead. The mail carrier drove to a near-by

house and found three neighbors, to whom he reported what he had seen. These three men, together with himself, went to the car, looked it over, noted the surrounding ground, looked through the car windows, saw the pool of blood, and the bullet wound. The only evidence of any one having been in the vicinity of the car was the track of a man about 50 yards therefrom going across the road from the northeast in a southwesterly direction. These tracks apparently had been made in the snow three or four days before the shooting. This observation of the surrounding conditions was first noted by the rural mail carrier on January 5, 1917, about 1 o'clock p. m. These same surrounding facts were witnessed by the three men who accompanied the mail carrier and corroborated him.

The further fact appears undisputed in the record that he was treasurer of the fraternal society known as the Ancient Order of United Workmen; that as such treasurer he was short in his accounts in the sum of $16,000 at the time of his death; that he sustained illicit relations with a woman other than his wife; that at or near the date of his death this same woman received a letter from him containing $150 in $50 bills.

This statement of facts constitutes an undisputed situation in this case.

The issue of fact which demonstrates beyond cavil the truth concerning the cause of Dodder's death unerringly points to the proposition that he came to his death by a shot fired from a 38-caliber Colt's revolver held in his own hand. The facts narrated by four disinterested witnesses who first saw Mr. Dodder, viewed his body, and examined the car and ground in that vicinity, unanswerably sustain the conclusion that Dodder's death was caused by suicide.

The burden of proof was upon the plaintiff to show that the death was accidental. Proof of this would show that the death was not suicidal, as said in *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, where this court

announced the rule in a similar case: "The burden is upon the plaintiff to show that the death was accidental; or, in other words, that it was not suicidal."

The facts concerning the death of deceased assured are so plain that death was not the result of accident, that the conclusion which the trial judge arrived at was correct as a matter of law.

As to evidence of powder marks, there is some conflict, but it preponderates in favor of the defense. The particles of powder imbedded in the wound, the skin surrounding the wound, the burns on the skin, indicate the gun at the time of its explosion was close to his temple. This is another instance of fact proving or tending to prove that the deceased assured came to his death by his own hand.

The errors complained of by plaintiff must be considered harmless, because the jury brought in the only verdict it could render when based on reliable and pertinent facts and competent evidence and the law as given by the court.

This court has in substance held, where the verdict announced by the jury was the only one permissible under the law and evidence, the judgment will be affirmed, and in such case errors occurring at the trial could not have been prejudicial. *Vernon v. Union Life Ins. Co.* 58 Neb. 494; *Jeffres v. Cashman,* 42 Neb. 594; *Mann v. Welton,* 21 Neb. 541. Also this court has specifically said in *Ramold v. Clayton,* 77 Neb. 178: "When the verdict returned by the jury is the only one justified by the evidence, errors in the giving and refusing of instructions are not prejudicial."

There is no material or competent evidence that points out a fact from which one could deduce the presumption that death might have resulted from accident or violence.

Under the plain provisions of the accident policy sued upon, plaintiff cannot recover for loss from death by suicide.

No reversible errors appearing in the record, and having rendered the only verdict permissible under the evidence, the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

DELLA M. DODDER, APPELLANT, V. PACIFIC MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED DECEMBER 15, 1919. No. 20627.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

A. S. Churchill and *Byron G. Burbank,* for appellant.

Gurley & Fitch, contra.

ALDRICH, J.

It appears of record that the same witnesses appeared in this case as in *Dodder v. Ætna Life Ins. Co., ante,* p. 70. Also the same issues were rendered, and it was stipulated that the decision in this case should follow *Dodder v. Ætna Life Ins. Co., supra.* This decision therefore is

AFFIRMED.

SEDGWICK, J., not sitting.

The following opinion on motion for rehearing was filed Feburary 28, 1920. *Rehearing denied.*

1. **Appeal:** AFFIRMANCE. Where the verdict announced by the jury was the only one permissible under the law and evidence, the judgment will be affirmed, and in such case errors occurring at the trial were not prejudicial.
2. **Insurance:** FORFEITURE. There is no forfeiture or denial of liability when the insurance company treats the policy sued upon as a valid or binding contract.
3. ———: DEFENSE: WAIVER. If the insurance company at all times throughout the negotiations denies liability, and sends blanks to

make proof of loss, subject however to its plenary rights to make whatever defense it may have, then there is no waiver of any defense it may have.

ALDRICH J.

The brief filed for rehearing shows one or two misstatements inadvertently made in the opinion, *ante,* p. 74, which require attention.

We erred in our statement that by stipulation it had been agreed that the decision in the *Ætna* case should be decisive in this case.

We also erred in our statement that the witnesses in the two cases were the same. This would be serious error if in considering the instant case we had failed to give due and proper consideration to the testimony of witnesses who swore in this case and did not testify in the *Ætna* case. In view of the fact, however, that in the consideration of both cases we did give consideration to the evidence of all the witnesses, we do not consider the mistake a serious one. The evidence bearing upon the profits in business in the year 1916 was considered by all the judges. The same is true of the evidence of the hackman, who swore that on the morning of January 4, 1917, he took the Moran woman from the Union Depot in Omaha, at 8:30 a. m., to Twenty-fourth and Vinton streets. The evidence going to the merits of the controversy that we considered final and conclusive was substantially the same in both cases, and we were of the opinion that the evidence shows that the death was suicidal.

It is also insisted that we erred in stating that the issues were the same in the two cases. They are substantially the same. It is true that the plaintiff argues at some length in the instant case that the defendant waived its defense that it was not liable upon the policy because defendant asked for proofs of death and proofs were furnished. The evidence, however, shows clearly that nothing in the nature of a waiver arose. In the request for proofs of loss, plaintiff was notified by an at-

tached reservation that the company did not waive any of its defenses, and the trial court was right in striking out the evidence upon that question. We hold the rule to be that, when a contract of insurance is treated by the company as valid and in full force during all the time of the negotiations, then its defense may be considered as waived; but when it denies liability, then there is no waiver.

It is also evident that from the beginning the insurance company in this case did not intend to recognize liability. The plaintiff very early in the proceedings knew this. It waived no defense it might have, and the parties understood each other perfectly.

It is said: "Where, by the policy or otherwise, the insured is informed, at the time the demand is made, that a full compliance with the policy will be required, and that the demand shall not be considered as a waiver of any forfeiture, no waiver will arise, though the insured complies with the request." 4 Cooley, Briefs on the Law of Insurance, p. 3520. We hold it to be the law that, where under the circumstances a reasonable person may believe that no formal or preliminary requirement of proof of loss will be required, then, if he waives cost and trouble in making proofs, it may be inferred that there is a waiver. But it is also true that a waiver of past failure, when evidenced by supplying blanks to the insured, will not be construed as waiver of future reasonable delay in furnishing the proofs. This substantially is the doctrine laid down in 1 C. J. 480, sec. 202. We hold it to state the law governing the question of waiver presented in the instant case.

It is evident that defendant company knew the facts surrounding this case, and it is also evident that it did not intend to recognize liability. Then, if it happens that the company fully intends to deny liability, it fully shows that proofs of loss are of no benefit to any one. Hence the general doctrine that, if an insurance company knows all about the facts and feels that there is no

liability on its part, there would be no reason to insist that the insured go to the trouble and expense of making proof of loss, when it already knew of the loss and what was claimed to be the cause of it. The company never intended to waive, and as a matter of fact it should in no way be construed that they waived, any defense. We hold that the assured under such circumstances should not be allowed to take advantage of the company, any more than the company should be allowed to take advantage of the assured.

In all of the preliminary arrangements between plaintiff and defendant, defendant always expressly reserved its right to whatever defense it might have. The defendant early took the position that whatever course plaintiff took she assumed the entire responsibility, and the defendant never assumed any liability on its policy by reason of Mr. Dodder's death. It early assumed the position that the filing of the proof of loss with the company, when completed, should not under any circumstances be considered as a waiver or impairment to any defense. Then it would seem that, if there is anything in the conduct and the attitude of the defendant towards the plaintiff, the defendant always expressly reserved its right to make a defense.

The instant case is different from *Home Fire Ins. Co. v. Kennedy,* 47 Neb. 138. In that case there was a stipulation for arbitration; in the instant case there was always at all times a denial of liability. In *Home Fire Ins. Co. v. Kennedy, supra,* after the loss of the property by fire was known, the company in a sense admitted its liability, recognized it by repeatedly demanding proofs of loss and insisting upon arbitration; here knowledge of the claim that death was caused by suicide and the parties never negotiated nor offered to compromise. The company virtually said: Here are your blank forms for proof of loss, make whatever showing you wish, advance whatever claims you have, but remember this defendant stands on its policy, upon the defense that plain-

tiff came to his death by shooting himself. Defendant always denied validity of its policy. Can any one claim a waiver under these circumstances and in face of facts like these? These Nebraska cases cited by plaintiff may set forth the abstract law, but the facts in this case do not apply to the ones of waiver as cited in those cases.

In the case of *Home Fire Ins. Co. v. Kuhlman,* 58 Neb. 488, the issue was the opposite of what we find in the instant case. In that case there was a plain inference of waiver to be drawn from the conduct of the insurer, with full knowledge of all the facts, to treat that policy as a valid and subsisting contract. In the instant case the only inference that can be drawn is: Your contract is a nullity by reason of suicide, and hence we deny liability. That is a very different situation from the *Kuhlman* case.

It is true, estoppel can only fairly arise when one party to the contract would induce the other to expend money and time in the belief that liability on the contract was not disputed. Thus it is plain that the evidence in this case is very different from that in the cases cited by plaintiff.

Defendant early investigated this case, and the evidence disclosed, as it well knew, that from all the facts in the case there was one certain definite conclusion to be arrived at. Dodder's death came from the rash act of his own hand. There was no room for speculation here. Under the evidence there is no well-grounded suspicion of accidental shooting or of robbery. Circumstances brought out in the record with respect to his financial and domestic relations afford undoubted proof that deceased assured came to his death by his own hand. So certain are we that our position is correct, it may be likened to one demonstrating a proposition in geometry. At the conclusion we can say axiomatically, "Which was to be demonstrated."

Defendant insists, in the matter of deceased assured's alleged shortage, that the evidence detailing this information was wholly incompetent, that no sufficient foun-

dation was made for its introduction in evidence, and that it was hearsay. In the *Ætna* case we held a shortage of $16,000 was shown, and counsel for plaintiff bitterly complained. We have again examined the evidence, as appears of record in the instant case, and it but reaffirms our former conclusion. The expert witness testifying here on this matter thoroughly qualified himself as to his legal right to testify on this question of shortage. The foundation was complete. Defendant's counsel went with painstaking detail into each matter, and deceased assured's own records show the amount turned over to him by his predecessor, the amount received from the grand recorder of the A. O. U. W., and also the disbursements. Disbursements made by deceased assured were introduced in evidence. Then the record discloses what was the full amount received and what was the full amount paid out, and it shows a shortage of $16,000. The expert accountant who testified could determine from the records Dodder kept as treasurer of the A. O. U. W. that there was a $16,000 shortage. The testimony and evidence with reference to the several banks where Dodder kept A. O. U. W. accounts simply amount to a corroboration of what was in Dodder's own books. The evidence of this expert stands uncontradicted in the record.

Appellant's discussions have been keen and analytical, but he has been unable to remove the one impassable barrier, suicide. Like Banquo's ghost, "it will not down," it is ever and anon. Two juries on the same facts of self-destruction have found the same way, and the evidence was so convincing that each jury brought in the only verdict permissible, and as a matter of law this court will not disturb such a verdict unless clearly wrong.

REHEARING DENIED.

LETTON and DAY, JJ., not sitting.

STATE, EX REL. CHARLES HALEY, V. JOHN E. MCCUTCHAN, SHERIFF, ET AL.
CHARLES HALEY V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1919. Nos. 21146, 21218.

1. **Larceny:** VARIANCE. On a charge of larceny as bailee, the proof must show that the defendant was a bailee. When the evidence fails to sustain the charge, there is a fatal variance between the complaint and the proof offered.
2. **Evidence** examined, *held* that it does not sustain the allegations of the information.

ERROR to the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed and dismissed.*

Arthur G. Abbott and *O. A. Abbott,* for plaintiff in error.

Clarence A. Davis, Attorney General, J. B. Barnes and *William Suhr, contra.*

ALDRICH, J.

The information charges defendant with larceny as bailee, under which charge defendant was tried and convicted, and has been confined in either the county jail or the state penitentiary since September, 1918. The record discloses that there is a fatal variance between the complaint and the proof offered to sustain the charge. The record also shows that at no time was defendant a bailee in this transaction; that he never saw nor spoke to the owner, nor did he receive the car from the owner; that there is no evidence in the record that defendant committed the crime of larceny as bailee.

This disposes of the proceedings in habeas corpus presented in connection with this case, No. 21146.

The judgment in *Haley v. State,* No. 21218, is reversed and the action is dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

STATE BANK OF OMAHA, PLAINTIFF, V. HERBERT B. WALDRON, APPELLANT: LIZZIE C. MORTON RUTH ET AL., APPELLEES.

FILED DECEMBER 26, 1919. No. 20642.

Mortgages: FORECLOSURE: COUPON NOTES. A third party, claiming an interest in mortgaged real estate, took over two of the overdue interest coupon notes of the debt, to prevent a foreclosure of the mortgage. On a subsequent default, foreclosure was brought, and he then attempted to set up the notes as part of the mortgage lien against the premises. On the issue of fact between the mortgagor and himself, as to whether he paid the notes as a volunteer, or took them by purchase and assignment from the mortgagee, the evidence *held* sufficient to show that he took the notes by purchase and assignment.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Byron G. Burbank, for appellant.

Morsman, Maxwell & Crossman and *Thomas Lynch*, *contra.*

MORRISSEY, C. J.

This action was brought by the State Bank of Omaha to foreclose a mortgage of $7,000 on a tract of real estate in Douglas county. Herbert B. Waldron, Florence G. Waldron, Lizzie C. Morton Ruth, Edmund P. Dunlap, and Carrie J. Dunlap were defendants. Before judgment, plaintiff bank dismissed its cause of action, and trial was had on the pleadings hereinafter mentioned.

Appellee Ruth, by answer and cross-petition, set up a mortgage of $24,000 upon the real estate, signed and executed by defendants Waldron, alleged, default in payment and prayed a foreclosure. Appellees Edmund P. Dunlap and Carrie J. Dunlap, his wife, filed a cross-petition, alleging that, February 15, 1916, in an action then pending in the district court for Douglas county, a decree was entered awarding the title and right of possession

of the real estate involved in this action to Dunlap, subject, however, to a mortgage of $24,000 held by Lizzie C. Morton Ruth; and that an appeal was prosecuted from this decree to the supreme court, where the judgment was set aside and the action dismissed. It is further alleged that, pending the appeal in the supreme court, Dunlap, to protect his interests under the decree, and in order to prevent a foreclosure of the $24,000 mortgage held by Mrs. Ruth, purchased from her two of the interest coupon notes for which the mortgage was given as security, amounting at the date of the purchase to $1,354.85. The cross-petitioners Dunlap and wife prayed that the coupons be decreed a part of the mortgage, and be made to constitute a charge and lien against the real estate. Appellants Waldron filed a general denial to the cross-petition of appellees Dunlap. The court entered a decree of foreclosure in favor of Mrs. Ruth for the amount due on her mortgage, and in favor of Dunlap for the amount of the two coupon notes, and made the same a lien upon the premises, subject and junior to the lien found in favor of Mrs. Ruth.

Defendants Waldron, who appear to be the holders of the equity of redemption, do not appeal from the decree in so far as it is in favor of Mrs. Ruth, but prosecute this appeal solely from that part of the decree based upon the coupon notes held by appellee Dunlap. The position of appellant is that Dunlap voluntarily paid Mrs. Ruth the interest represented by the two coupon notes, and that the court, having finally determined in the action heretofore mentioned that he had no interest in the premises, Dunlap was not entitled to be subrogated to any of the rights or interests of Mrs. Ruth under the mortgage.

The controlling question is: Did Dunlap purchase the two coupon notes, or did he voluntarily pay them for the benefit of appellant? The principal note, with the coupons attached, was in the hands of Mr. Crossman, attorney for Mrs. Ruth. The coupons in question were due, and the attorney, in good faith, dealt with the attorney for

Dunlap. As a result of these negotiations, Dunlap's attorney paid the full amount due on the coupons to the attorney for Mrs. Ruth and, following the instruction of his principal, took over the coupon notes. The correspondence between appellee and his attorney, and between the latter and the attorney for Mrs. Ruth, is set out in the record. Dunlap wrote his attorney: "I am sending a draft for $1,354.85 to take over the coupon note of Mrs. Ruth. Now, do what you think is best." In another letter he wrote: "Send those coupons here, and can take them to the bank and use them for collateral to the other interest."

Letters from appellee's attorney to his client are also in evidence, and in none of these is it suggested that the notes be paid, but the correspondence refers to the taking over of the notes, or to assignments. There is also a letter from the attorney for Mrs. Ruth. In this letter he speaks of an offer which he had theretofore made to indorse the notes without recourse upon his client, but explains that such a proposition was with the understanding that any right of lien which appellee might acquire by reason of the coupon notes should be junior to the lien of his client. After some negotiations, the notes were delivered to Dunlap's attorney and the money paid to the attorney for Mrs. Ruth.

Appellant called Mrs. Ruth, the owner of the notes, as a witness, and in answer to interrogatories she testified that she did not sell the notes to appellee; that she had not been asked to indorse them, and had not indorsed them; and that she had not authorized any one to sell them. She said that she had given them to her attorney to collect. She is a woman advanced in years, and was in feeble health. Her testimony shows that she had not seen the notes before and could not identify them when they were presented. She said: "Mr. Crossman does all my legal business and has all my papers. I have been sick for a long time, and I have not been able to attend to anything. * * * I told you I put my papers in Mr.

Crossman's hands, and as he had legal ability and knew what to do, I was out of it, because I was sick, and this matter has been hanging in court and torturing me for four years, and it is ruining my health." This indicates that Mr. Crossman, her attorney, was instructed only in a general way to look after her business. She does not complain of the conduct of her attorney, but expressly compliments him upon his ability. He carefully guarded her interests; he received the money and preserved her lien as the first and superior lien upon the premises. She has not repudiated his transfer of the notes. The correspondence between appellee and his attorney indicates that appellee did not intend to pay the notes, but intended to acquire their ownership. This is indicated, not only by the fact that the notes were received without being marked paid, but by the fact that he intended to put them up as collateral. Neither of the attorneys use the word "paid" or "payment," but the language employed indicates a transfer of ownership.

We are convinced that the trial court correctly found that the ownership of these notes was in appellee. They are a valid obligation, and the amount due thereon was properly made a lien upon the mortgaged premises, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

PETER DAHLSTEN, TRUSTEE, APPALLEE, v. BERTHA S. LIBBY ET AL., DEFENDANTS: GEORGE W. WYANT, APPELLANT.
FILED DECEMBER 26, 1919. No. 20940.

1. **Appeal: TIME.** "The time for taking an appeal from the district court to the supreme court begins to run when the final judgment is entered of record." *In re Estate of Getchell*, 98 Neb. 788.

2. **Appeal: DISMISSAL.** An appeal to the supreme court from the confirmation of sale on foreclosure will not be dismissed because appellant has, after the entry of the decree, disposed of his interest

in the real estate, where such disposition is by warranty deed on whose covenants he may be rendered liable.

3. Mortgages: FORECLOSURE: APPEAL: REDEMPTION. The proper procedure, where defendant desires to redeem from a decree of foreclosure after the transcript on appeal is lodged in the supreme court, is to make application to that court for leave to redeem.

4. ———: ———: ———: ———. Where it is made to appear that defendant in a foreclosure suit, pending the appeal in the supreme court, paid the amount due into the office of the clerk of the district court, by way of redemption, and the owner of the decree accepted the money and entered a release of the decree upon the docket of that court, such redemption will be approved upon payment of the costs in the supreme court by appellant.

APPEAL from the district court for Wheeler county: JAMES R. HANNA, JUDGE. *Remanded, with directions.*

J. M. Shreve and *T. J. Doyle,* for appellant.

J. R. Swain, contra.

MORRISSEY, C. J.

This suit was commenced in the district court for Wheeler county to foreclose a real estate mortgage. The court rendered a decree of foreclosure. There was sale of the mortgaged premises; the sale was confirmed, and this is an appeal from the order of confirmation.

Plaintiff filed a motion to dismiss the appeal for the reason, among others, that more than three months elapsed between the making of the order overruling defendants' objections and confirming the sale and the date of filing the transcript in this court. The record, so far as it relates to this assignment, may be summarized as follows: The sale was confirmed June 3, 1918; the order of confirmation was filed with the clerk of the district court, June 12, 1918, but the clerk did not spread it on the journal until December 31, 1918. The appeal was docketed in this court, January 29, 1919, less than 90 days from the time the order was spread upon the journal. "The time for taking an appeal from the district court to the supreme court begins to run when the

final judgment is entered of record." *In re Estate of Getchell*, 98 Neb. 788.

The other grounds urged in support of the motion to dismiss may be considered together. It is said that there is no party before the court who has a right to prosecute the appeal; that defendants Wyant have sold the land, and therefore have no interest in the subject-matter of the suit; that their grantee, who took by warranty deed prior to the confirmation, is not complaining of the order of the district court, nor is he in a position to do so, since he purchased while suit was pending, and with notice of the suit. These objections are not well taken. Even though the Wyants have sold the land, they are still entitled to show that the confirmation is erroneous, in order to protect themselves against liability under the warranty deed which they have given. Plaintiff, therefore, is not entitled to a dismissal of the appeal on any of the grounds advanced.

By showing, filed by appellee, it is made to appear that on November 1, 1918, plaintiff entered into an agreement with one David E. Chipps, whereby, for the consideration of $4,250, plaintiff agreed to convey the real estate to Chipps, and on or about March 1, 1919, apparently in compliance with the agreement just mentioned, plaintiff assigned all his interest under the decree to Chipps, for the consideration mentioned in the original contract. Plaintiff reserved, however, "the right to collect the rent for the season of 1918, under the supersedeas bond given for appeal." After the order of confirmation, from which this appeal is prosecuted, Chipps made application to the district court for an order directing the sheriff to make a deed to the premises to him, and it is said that such order was made, but a copy thereof is not set out in the transcript. It is further alleged that the damage sustained by reason of this appeal had accrued to the plaintiff under the supersedeas bond prior to the taking over of the decree by Chipps; that Chipps claims no right of action upon the bond for rent; that he neither agreed that

the land might be redeemed from sale, nor in any way assented to a redemption; that he purchased and paid for the assignment of the decree after the time for appeal to the supreme court had expired; that he has at all times demanded a deed, and still insists that he is at this time entitled to a deed for the land. This confusion arises, in part, at least, from the assumption that the appeal was not prosecuted in due season. The holding already indicated sufficiently disposes of the assertion that Chipps purchased the decree after the time for appeal had expired.

By supplemental certificate from the clerk of the district court for Wheeler county, it is made to appear that April 7, 1919, appellant George W. Wyant paid as redemption money to the clerk of that court the full amount due under the decree, together with the costs in that court, and that on June 30, 1919, Chipps through his attorney accepted the money and receipted the docket, "fully releasing the said judgment and decree." The proper procedure where defendant desires to redeem from a decree of foreclosure after the transcript on appeal is lodged in this court, is to make application to this court for leave to redeem. This practice was not followed in the instant case; but, inasmuch as the assignee of the decree accepted the money, and entered a release of the judgment on the docket of the district court, such redemption will be approved. Whatever agreement plaintiff may have had with Chipps as to the rents is not before us for determination.

It appearing that, pending the appeal, appellant George W. Wyant paid the amount of the decree, with interest and costs, to the clerk of the district court, and that the person appearing of record as the assignee of plaintiff has accepted the money and released the judgment, the redemption is approved; but, such redemption having been made without leave of this court, the costs herein will be taxed to the appellant, and the cause is remanded to the district court, with directions to set aside the order

of confirmation, and to enter the proper order of redemption.

REMANDED.

SEDGWICK and ALDRICH, JJ., not sitting.

COURTLAND J. YEARSLEY, APPELLEE, v. REBECCA A. GIPPLE, APPELLANT.

FILED DECEMBER 26, 1919. No. 20473.

1. **Waters: RIPARIAN OWNERS: COMMON LAW.** The common law as to the rights and duties of riparian owners is in force in this state, except when altered or modified by a statute.
2. **———: ———: ACCRETIONS.** If lands become riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, even though they extend beyond the original boundary line of his land.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

William H. Pitzer, Earl M. Cline, Varro E. Tyler, George E. Hager and *O. L. Jones,* for appellant.

D. W. Livingston, contra.

LETTON, J.

The purpose of this action is to quiet the title to certain lands lying in the valley of the Missouri river, together with accretions, and to enjoin the defendant from trespassing upon the accreted lands. The defendant denies the title of plaintiff to the premises, and by way of cross-petition alleges title in herself by deed from Mary A. Topping to that portion of the accreted lands which lies east of the original boundary of plaintiff's land. The court found that plaintiff was a riparian owner, and entitled to all accretions; that the defendant's grantor, Mary A. Topping, was not possessed of any title or interest in the accreted land, and that her deed conveyed

no title to the defendant. The title of the plaintiff was quieted, defendant was enjoined from entering or trespassing upon the premises, and her cross-petition was dismissed, from which decree she appeals.

In 1908 a tract of land 200 rods square in the northwest corner of section 31, described as "Government lot No. 1, and accretions, in section 31," and also by a sectional description which would have applied to it if it had been in existence and surveyed when the original survey was made, was conveyed by Mary A. Topping to John M. Livingston. This title is held by the plaintiff by mesne conveyance from Livingston.

At the time of the government survey, there was only a small portion of land in the northwest corner of section 31, the remainder of the section being occupied by the Missouri river. Afterwards a large body of accreted land, part of it occupying the place where defendant now claims, was formed to the south and east of this tract. Still later, that vagrant and inconstant stream, by a gradual change of channel, moved westward again and washed away these accretions to a large extent.

In September, 1912, when the plaintiff purchased, there was some of the accreted land belonging to the Toppings lying to the east of the 250-acre tract. The river continued to encroach westward. In November, 1912, a survey of the land was made, and a plat drawn by the county surveyor. This plat and the testimony of the surveyor show that at that time all of the accretions east of the 250-acre tract had been washed away, and the west bank of the river was some distance within the east boundary of the tract. Afterwards the river receded again, and accretions formed to the eastward. The title to the accretions which lie to the east of the original line of plaintiff's land is the matter in controversy in this action.

Plaintiff's contention is that, after the land to the east had been washed away, so that the river formed the eastern boundary of his land, he became a riparian owner, and as such was entitled to all accretions which there-

after formed in front of his property, without regard to the original boundary lines.

Defendant contends that, where a conveyance of land is made by definite boundaries, accretions extending beyond such boundaries do not pass by the deed; that the riparian owner may claim to this original boundary line only, and that the original owner of the soil so washed away and gradually replaced may again assert title.

A critical examination of the cited decisions by defendant shows that a number of general expressions are used which, if considered without reference to the facts in each case, might mislead. They are mostly cases in which the several courts considered that the stream had changed its course by avulsion. The principles applying to avulsion do not apply where the original soil was gradually disintegrated and washed away, the river taking its place, and, as it receded, leaving accretions. When, by gradual erosion, the river became the boundary of plaintiff's land, he then became a riparian owner, and was entitled to all accretions. "The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil; no other rule can be applied, on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is also without remedy for his loss in this way, he cannot be held accountable for his gain." *New Orleans v. United States,* 10 Pet. (U. S.) *662. This decision was quoted from and approved in *Lammers v. Nissen,* 4 Neb. 245, 250.

The contention of defendant that, where there are known boundaries of land which has been submerged, this principle does not apply, has been carefully considered by the courts of England and Ireland, and a contrary conclusion reached. *Gifford v. Yarborough,* 5 Bing. (Eng.) 163 (3 B. & C. *91). This case was decided in the same manner in the King's Bench, and after-

wards brought by writ of error to the House of Lords. Lord Eldon and Lord Chancellor Lyndhurst took part in the decision in the House of Lords, which was unanimous. See, also, *In re Hull and Selby Ry.*, 5 M. & W. (Eng.) *327, and *Attorney General v. M'Carthy*, 2 I. R. (1911) 260, in which it was held that the existence of marks, bounds, or other evidence by which the former boundary line could be ascertained, did not prevent a private owner of lands acquiring title to the accreted land. This is the general rule in this country. *Welles v. Bailey*, 55 Conn. 292. Courts in other states bordering upon the Missouri river take the same view. The exact point is decided in *Widdecombe v. Chiles*, 173 Mo. 195, 61 L. R. A. 309; *Buse v. Russell*, 86 Mo. 209; *Naylor v. Cox*, 114 Mo. 232; *Cox v. Arnold*, 129 Mo. 337; *Peuker v. Canter*, 62 *Kan.* 363; *Fowler v. Wood*, 73 *Kan.* 511, 117 Am. St. Rep. 534; *Nebraska v. Iowa*, 145 U. S. 519, 12 Sup. Ct. Rep. 396; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518.

The common law as to the rights and duties of riparian owners is in force in this state, except when altered or modified by a statute. This court from its earliest decisions on this subject has followed the common law. *Lammers v. Nissen, supra; Gill v. Lydick*, 40 Neb. 508; *Meng v. Coffee*, 67 Neb. 500; *Kinkead v. Turgeon*, 74 Neb. 580. In *Bouvier v. Stricklett*, 40 Neb. 792, both accretion and avulsion had taken place. The fourth paragraph of the syllabus is: "Where the middle of the channel of a stream of water constitutes the boundary line of a tract of land, and the water undermines the banks and the soil caves in and mixes with the water and is washed away, the owner of the land must stand the loss; and the middle of the new channel formed for the river by such process, if a new channel is thus formed, will constitute the boundary line of the tract of land."

In *Ocean City Ass'n v. Shriver*, 64 N. J. Law, 550, 51 L. R. A. 425, which is the principal case relied upon by defendant, and other cases making the same quotation,

there is a misconception as to the rule laid down in De Jure Maris, a work ascribed to Lord Hale, in that the text quoted to support the decision is taken from that part of the treatise relating to sudden changes by avulsion or by submergence. The writer treats, first, of "Alluvio maris," next of "Recessus maris." As to land acquired by accretions, or, as he says, "by insensible degrees," it is said: "That such an acquisition lies in custom and prescription; and it hath a reasonable intendment, because these secret and gradual increases of the land adjoining *cedunt solo tanquam majus principali;* and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the cival law." He then takes up the subject of "Recessus maris," saying: "This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of *alluvio,* or increase *per projectionem.*" "But in the case of *alluvio maris,* it is otherwise, because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land, and, therefore, in case of private rivers, it seems by the very course of the common law, such a gradual increase *cedit solo adjacenti.*" Chapter 6, De Jure Maris, containing the above quotations, is reprinted in 16 Am. Rep. 60. It is under that part of the chapter treating of the sudden retreat of the sea, *recessus maris,* that the quotation in the New Jersey case, and in the other opinions to the same effect, is found, and it is inapplicable to the facts in cases of pure accretion.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI ET AL., APPELLANTS, V. SAMUEL R. MCKELVIE, GOVERNOR, ET AL., APPELLEES.

FILED DECEMBER 26, 1919. No. 21153.

1. **Statutes:** CONSTRUCTION. Statutes pertaining to the same subject-matter should be construed together, and this is particularly true if the statutes were passed at the same session of the legislature.
2. ———: ———. The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the pre-existing law and any other acts relating to the same subject.
3. ———: ———. Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions.
4. **Constitutional Law:** STATUTE: CONSTRUCTION. Since it ought never to be presumed that the legislature intended to violate the Constitution, a doubtful or ambiguous statute should be so construed as to uphold its validity.
5. **Evidence:** JUDICIAL NOTICE: ILLITERACY. The court is entitled to take judicial notice of the facts disclosed by the operation of the federal selective draft law with reference to the inability of thousands of men born in this country to speak the language of their country, or understand words of command given in English.
6. **Schools and School Districts:** FOREIGN LANGUAGE ACT. The word "school" as used in chapter 249, Laws 1919, refers to and means a school which presents a course of study such as that prescribed in the compulsory education act, and attendance upon which would satisfy the requirements of that act.
7. **Constitutional Law:** FOREIGN LANGUAGE ACT: CONSTRUCTION. If the law should be construed to mean that parents or private tutors might teach a foreign language, but that others could not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative and void, there being no reasonable basis of classification.
8. **Schools and School Districts:** FOREIGN LANGUAGE ACT: CONSTRUCTION. Chapter 249, Laws 1919, does not prohibit the teaching of a for-

eign language if taught in addition to the regular course of study in the elementary schools, so as not to interfere with the elementary education required by law, and outside of regular school hours during the required period of instruction.

9. **Constitutional Law**: FOREIGN LANGUAGE ACT: VALIDTY. The act in question is not strictly a penal statute, but is mostly remedial in its nature. It is not broader than its title, and not an unreasonable interference with the liberty or property of the plaintiffs and interveners.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

A. M. Post, John J. Sullivan, Albert & Wagner, Arthur F. Mullen and *Joseph T. Votava,* for appellants.

Clarence A. Davis, Attorney General, and *George W. Ayres, contra.*

A. H. Byrum and *Joseph Wurzburg, amici curiæ.*

LETTON, J.

This is an action to restrain the enforcement of chapter 249, Laws 1919, on the ground that it violates several of the provisions of the Constitution of this state, and of the Fourteenth amendment to the Constitution of the United States. Joining with the plaintiffs and asking for the same relief are certain local church corporations conducting parochial schools, certain private schools, and several foreign language speaking parents.

In substance, the complaints of the plaintiffs and interveners are that, since the officers and members of the respective churches are largely made up of foreign language speaking people, if the act is enforced their children will be unable to obtain instruction in religion and morals in accordance with the doctrines of the religious denominations to which the parents belong, in the language of their parents; that many of the children cannot understand English, and cannot understand such instruction in that language; that in the parochial schools below the seventh grade the language of the parents is used in order to teach English, and that the children cannot

learn English if they do not receive rudimentary education in the tongue the parents use; that property rights in the school buildings and grounds, and in the good will of the schools, will be destroyed; that the defendants, McKelvie, as governor, Davis, as attorney general, and Shotwell, as county attorney of Douglas county, are severally threatening an enforcement of the act by causing the arrest and prosecution of the plaintiff's officers and teachers.

The enrolled act complained of is as follows, the copy in the published laws being slightly inaccurate: "An act relating to the teaching of foreign languages in the state of Nebraska:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.

"Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Section 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not less than twenty-five ($25) dollars, nor more than one hundred ($100) dollars, or be confined in the county jail for any period not exceeding thirty days for each offense.

"Section 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

A general demurrer to the petitions was sustained, and the action dismissed. Plaintiffs and interveners appeal.

The appellants assert that the act is not regulatory; that it is an unwarranted interference with purely domestic affairs, and an invasion of the inherent discretion of parents in prescribing the course of instruction

best adapted to the spiritual and material needs of children of their respective faiths; that the demurrer admits that many parents have reached an age where it is impossible for them to acquire a sufficient knowledge of English to enable them to counsel and admonish their children in matters of faith and morals in the English language, and that the teaching of foreign languages is largely to enable them to participate in the same religious services and exercises in the home and in the church; that the schools are private institutions, and having discharged their duty to the state by providing instruction equal to that of the public schools, they may not be penalized for giving additional instruction, whether religious or secular; that the understanding of other languages and literature is not harmful to the individual or to the state itself; that, so far as the act imposes a penalty upon teachers for giving instruction in other languages, it is violative of their constitutional right to engage in the practice of their profession or calling. They complain that the act discriminates against teachers who teach foreign languages in schools, and leaves the teacher who gives such lessons in private free to pursue his calling; that, if any teacher should open a night school to instruct those who could not understand English, in arts or sciences, he would violate the act, whereas another could form private classes and give instruction in a foreign language without offense.

They also maintain that the first section of the act is not within the title; that the state has power to regulate the course of study in the public schools, and prevent the study of any subject not in the course, and can regulate private schools so as to require them to maintain a like course of study, but has no power to prevent pupils in private schools from studying branches in addition to the course of study prescribed by the state; that the state cannot claim a monopoly of teaching; and that the right to study any subject is a personal right which is protected by the Constitution.

Previous to 1919 there was no provision in the statute expressly specifying the branches of study to be taught in the common schools. The operation of the selective draft law disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. It was also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.

The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language. In other states the same conditions existed, and steps have been taken to correct the evil. In 1919 the legislatures of Iowa, Kansas, Maine, Arkansas, Indiana, Washington, Wisconsin, and New Hampshire passed measures more or less drastic with regard to compulsory education in English, and the prohibition of the use of foreign languages in elementary schools.

It is a general rule that statutes pertaining to the same subject-matter should be construed together, and this is particularly so if the statutes were passed at the same session of the legislature. The general principle is that the legislature must be presumed to have in mind all previous legislation upon the subject, including statutes closely related, so that in the construction of this statute we must consider the pre-existing law, and any other

acts relating to education, or subjects of instruction, passed at the 1919 session, which may tend to elucidate the intention of the legislature.

The compulsory education act of Nebraska, as amended in 1919, chapter 155, Laws 1919, requires that every child, or youth, not less than seven nor more than sixteen years of age, shall, during each school year, attend public, private, denominational or parochial day school for not less than twelve weeks, and in the city and metropolitan city school districts attend the full period of each public school year in which the public day schools are in session, with certain exceptions.

All private, denominational and parochial schools and all teachers employed or giving instructions therein, shall be subject to and governed by the provisions of the school laws of the state as to grades, qualifications and certification of teachers. They are required to have adequate equipment and supplies, and shall have grades and courses of study substantially the same as the public schools where the children will attend in the absence of private, denominational or parochial schools. Nothing in the act is to be construed as interfering with the religious instruction in such schools.

Instruction is required to be given in American history and in civil government, both state and national, such as will give the pupils a thorough knowledge of the history of our country, its Constitution and our form of government, and such patriotic exercises shall be conducted as may be prescribed by the state superintendent. It is also provided that nothing in the act contained shall be so construed as to interfere with religious instruction in any private, denominational or parochial school.

It is also settled law that, where the general intent of the legislature may be readily discerned, and yet the language in which the law is expressed leaves the application of it in specific instances obscure, doubtful, ambiguous or uncertain, the courts may have recourse to historical facts, or general public information, or the conditions

of the country at and immediately prior to the passage of the law, in order to aid them in interpreting its provisions. The language may be so indefinite that, if construed in one way, it may violate the Constitution, while, if construed in another equally permissible manner, its passage would not be inhibited. Since it ought never to be presumed that the legislature intended to violate the Constitution, the obvious and necessary construction to be given is that which will uphold the statute.

From a consideration of both of these statutes, as well as of chapters 248, 250, Laws 1919, it is clear that the purpose of the legislature was to abolish the teaching of foreign languages in elementary schools, when such schools are used for imparting the instruction required in the public schools, or the using of such languages as the medium of instruction; to provide that the standard of education prescribed for the elementary public schools should apply to all other schools; that the ordinary time and attention devoted to such instruction should not be diverted to other subjects, except as specified in the act; and that the same character of education should be had by all children, whether of foreign born parents, or of native citizens. The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this goverment was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals, and to teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men.

Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. "The safety of the people is the supreme law." The concept that the state is everything,

and the individual merely one of its component parts, is repugnant to the ideals of democracy, individual independence and liberty expressed in the Declaration of Rights, and afterwards established and carried out in the American Constitution. The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual.

The act as thus construed merely carries out the purpose of regulation to a greater extent than specified in the compulsory act. The term "school," as used therein, evidently means a school which presents a course of study such as those prescribed for the public schools, and attendance upon which would satisfy the requirements of the compulsory law. The intent evidently is that none of the time necessarily employed in teaching the elementary branches forming the public school curriculum shall be consumed in teaching the child a foreign language, since whatever time is devoted to such teaching in school hours, must necessarily be taken away from the time which the state requires to be devoted to education carried on in the English language.

Furthermore, there is nothing in the act to prevent parents, teachers or pastors from conveying religious or moral instruction in the language of the parents, or in any other language, or in teaching any other branch of learning or accomplishment, provided that such instruction is given at such time that it will not interfere with the required studies. The law only requires compulsory education for children not less than seven, nor more than sixteen years of age, for a period of not less than twelve weeks in certain districts, and a longer period in others. If a child has attended either the public or private school for the required time, it could not have been the intention of the legislature to bar its parents,

either in person, or through the medium of tutors or teachers employed, from teaching other studies as their wisdom might dictate. There can be no question of the cultural effect of the knowledge of a foreign language. There is nothing in this statute to interfere with teaching the Bohemian language on Saturday or Sunday, as is done by the intervening Bohemian schools of Omaha and South Omaha.

The assertion that it is necessary to teach Polish in order to teach English does not seem well founded. It is said several times in the briefs, and it was said in the oral argument, that a number of statements in the petitions are admitted by the demurrer, and must be taken as true. In a general sense a demurrer admits the allegations of the petition, but it does not admit conclusions drawn from the facts stated. We think we are not bound to draw the conclusion that because children, when they first attend school, cannot understand or speak English, they must be taught the language of their parents, whether Polish or Bohemian, in order that they may learn English, otherwise no children of foreign speaking parents attending the public schools, wherein no other language than English is spoken, could ever learn the language. It is common knowledge that the easiest way to learn a foreign language is to associate only with those who speak and use it. Of course, the occasional use of a few words of the language of the home in order to explain the meaning of English words would not, if good faith is used, violate the act as seems to be feared.

The further objection is made by some of the interveners that, while they can understand and speak English to some extent, they are not sufficiently familiar with the language to give religious or moral instruction to their children in that language. There is no necessity that religious or moral teaching be given in English, and a parent who can speak and understand German, Polish, Bohemian, or any other language, can assuredly convey

lessons of truth, morality and righteousness in that language. So with respect to the complaint that the pastor, or the teachers in private or parochial schools, cannot give moral and religious instruction in English, it is not the medium through which such ideas are conveyed that is material, it is the lessons themselves which are essential to right conduct and good citizenship, and, as we construe it, there is no prohibition in the act to interfere with such teaching in a foreign language. The contention made that, by virtue of section 2 of the act, no foreigner may be taught in any other language than English unless the pupil has successfully passed the eighth grade, as evidenced by a certificate issued by the county superintendent, must be taken as applying only to pupils attending public or private schools, and in the sense that a pupil in such schools may not there be taught any language other than English unless he has attained and passed the eighth grade. If the act should be construed to mean that no person could at any time be taught any other language than English unless possessed of a certificate of graduation issued by the county superintendent, it would be discriminatory as being an unreasonable exercise of the police power, and interfering with individual liberty.

If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain.

As to the allegations with respect to the invasion of property rights by depriving certain interveners of the value of the "good will" in their schools, no facts are alleged, but mere conclusions, which are not admitted by the demurrer.

It has been said that this is a penal statute, and must be strictly construed. In a limited and restricted sense the statute may be penal, but in our opinion it is remedial in its nature. It is designed to remove a condition seriously inimical to the public welfare. It must be reasonably construed, not alone by taking into account the words of the particular measure, but by considering the mischief which the legislature was endeavoring to remedy. If construed as plaintiffs and interveners contend, it could not be applied. If experience shows that the practical working of the act is harsh or inconvenient, even though valid and constitutional, the legislature will no doubt remedy its defects; and, if the legislation is unwise, those who are injured have an incentive to see that their views are represented in another legislature.

As to the contentions that the act is broader than its title, and that the subject of the first section is not embraced therein, it must be said that the title is exceedingly broad, "An act relating to the teaching of foreign languages in the state of Nebraska." The prohibition of the teaching of any other language than English in the first section clearly has relation to the teaching of foreign languages, and is within the title. The other section also "relates" to such teaching.

It has also been urged that the statute is unreasonable, and is therefore void. An unreasonable law is not necessarily unconstitutional, and the remedy for such an enactment is with the legislature by way of amendment or repeal.

It has been said by the United States supreme court in *Gundling v. Chicago,* 177 U. S. 183, 20 Sup. Ct. Rep. 633, that the courts will not interfere with the operation of a regulative statute, "unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state

to pass, and they form no subject for federal interference." *Giozza v. Tiernan,* 148 U. S. 657, 13 Sup. Ct. Rep. 721.

Neither the Constitution of the state nor the Fourteenth amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. "If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks, if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer, nor become embittered towards society because, though an industry has crippled him, it has paid him nothing, if acts aiming to make better citizens by diminishing the chances of pauperism are sustained, if it is competent for the state to protect the minor from impoverishing himself by contract, it surely is not an arbitrary exercise of the functions of the state to insist" that the fundamental basis of the education of its citizens shall be a knowledge of the language, history and nature of the government of the United States, and to prohibit anything which may interfere with such education. Laws, the purposes of which are with respect to foreign language speaking children, to given them such training that they may know and understand their privileges, duties, powers and responsibilities as American citizens, which seek to prevent a foreign language from being used as the medium of instruction in other branches, and as the basis of their education, are certainly conducive to the public welfare, and are not obnoxious to any provision of either the state or federal Constitution.

AFFIRMED.

COBNISH, J., dissents.

BERNARDINE DEWULF ET AL., APPELLANTS, V. PHILOMENA DEWULF ET AL., APPELLEES: JULIUS CORNILLIE ET AL., APPELLANTS.

FILED DECEMBER 26, 1919. No. 20629.

1. **Adverse Possession.** Title to realty may be established by proof of actual, open, exclusive and continuous possession under claim of ownership for the statutory period of ten years.
2. **Witnesses: COMPETENCY.** An adverse party who is a representative of a deceased person is not disqualified by the Nebraska statute from testifying to a conversation confined exclusively to the person deceased and a third party. Rev. St. 1913, sec. 7894.
3. **Judgment: CONCLUSIVENESS: DECREE OF HEIRSHIP.** In the settlement of an estate, a county court by decreeing the descent of title to land cannot conclude parties to a *bona fide* controversy over such title.

APPEAL from the district court for Wheeler county: BAYARD H. PAINE, JUDGE. *Affirmed.*

T. J. Doyle and *G. N. Anderson,* for appellants.

W. L. Rose, J. C. Martin and *A. L. Bishop, contra.*

ROSE, J.

This is an action to partition 160 acres of land in Wheeler county. The tract was formerly owned by Braziel DeWulf, a bachelor, who died intestate January 20, 1895, leaving three brothers, who also died intestate, their names and dates of deaths being: Henri DeWulf, 1911; Charles DeWulf, 1914; Constantine DeWulf, 1915. Plaintiff Bernardine DeWulf is the widow of Henri DeWulf and the other plaintiffs are his three daughters. Plaintiffs claim an undivided three-sixths of the land by descent—two-sixths from Henri DeWulf and one-sixth from Charles DeWulf, a bachelor. The widow and the children of Constantine DeWulf are defendants. Defendant Philomena DeWulf, widow of Constantine DeWulf, resists partition on the grounds that Braziel DeWulf gave

her the land, and that she has had open, continuous, adverse possession of it ever since his death, claiming, occupying and using it as her own. The trial court entered a judgment in her favor, and plaintiffs have appealed.

The controlling question presented by the plaintiffs is the insufficiency of the evidence to establish the defense of adverse possession. It is argued on the affirmative of this proposition that plaintiffs and defendant Philomena DeWulf, under the law of descent, are cotenants; that her possession is the possession of all, and that competent evidence of notice essential to the adverse possession of a cotenant is not found in the record.

There is evidence tending to prove the following facts: Philomena DeWulf lived with her husband and children on a homestead near that of Braziel DeWulf, who lived in a dugout. She baked and washed for him. Sometimes she boarded him. At times he stayed at her home. For services, board and lodging, she received no compensation. He was on friendly terms with her husband, but he did not want any of his property to go to his brothers Henri and Charles, and said so. During his last illness he informed a neighbor that the land should go to Philomena DeWulf. He had previously told her it would be hers. He died without making a will, and she took possession of his land immediately, claiming to be owner, and ever since, by herself or tenants, has been in continuous, open, adverse possession, paying the taxes and using the land or collecting the rents. She built a little frame house on the place, moved a small barn thereon, and enlarged a pasture. Until this suit was brought her right of possession as absolute owner and her title had never been questioned. In the community the land was called hers and her children's. Shortly after the death of Braziel DeWulf, Philomena DeWulf, in the presence and hearing of Charles DeWulf, made her claim of ownership known to him. A year or so later this claim was communicated to Henri DeWulf.

The testimony of this character in connection with circumstances and incidents appearing in evidence is sufficient to prove that title in Philomena DeWulf had been established by adverse possession long before plaintiffs instituted this action.

Notice to Henri DeWulf and Charles DeWulf of the nature of Philomena DeWulf's claim to the land, however, depends on the testimony of two of her children, and plaintiffs argue that their testimony is inadmissible under the statute providing that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Rev. St. 1913, sec. 7894. These two children testified to a conversation between their mother and their uncle, Charles De Wulf. The witnesses took no part in the conversation, but overheard it, and it gave notice to Charles DeWulf that their mother claimed to be absolute owner of the land. While conversations between the deceased person and the witness are within the terms of the statute, conversations between the deceased person and a third party are not. *In re Estate of Powers,* 79 Neb. 689; *Kroh v. Heins,* 48 Neb. 691; *Scott v. Micek,* 86 Neb. 421; *McNea v. Moran,* 101 Neb. 476. This point, therefore, is not well taken.

Plaintiffs contend, further, that the defense of adverse possession is defeated by a decree rendered by the county court December 15, 1899, in the settlement of the estate of Braziel DeWulf. The county court found that the only heirs at law of decedent were his three brothers, and decreed that his real estate "descend share and share alike" to them. The argument seems to be that the decree is conclusive, that the brothers were then cotenants, that the possession of one was the possession of all, and that there was no subsequent notice that Philomena DeWulf, wife of decedent's brother, Constantine DeWulf, claimed the land as her own. The de-

cree of the county court settled the question of heirship, but that part of the decree relating to the descent of the real estate did not conclude Philomena DeWulf on her claim that she had previously acquired the land by gift, and that therefore there was no title to descend to the heirs mentioned in the decree of the county court. She was in possession of the land at the time, claiming in good faith to be the owner. She had notified the brothers of Braziel DeWulf of her claim. The statutory period for acquiring her title by adverse possession had begun. A question of title over which the county court had no jurisdiction prevented the decree from concluding her. *Fischer v. Sklenar*, 101 Neb. 553; *State v. O'Connor*, 102 Neb. 187; *Dunn v. Elliott*, 101 Neb. 411; *Gillespie v. Truka*, p. 115 *post*.

In this view of the evidence and the law, the judgment of the district court is free from error.

AFFIRMED.

SEDGWICK, J., not sitting.

GEORGE E. DOVEY, ADMINISTRATOR, ET AL., APPELLANTS, V. FRANK E. SCHLATER, SPECIAL ADMINISTRATOR, ET AL., APPELLEES.

FILED DECEMBER 26, 1919. No. 21101.

1. **Partnership: DECEASED PARTNER: RIGHTS OF HEIRS: PRESUMPTION.** Several heirs who inherit the interest of one of two equal partners in a partnership business, and thereupon join in the management and conduct of the business without any contract with the former partner, will be presumed to each have an equal share in the profits with the other partner, but it will not be presumed that they are to share in the undivided one-half of the capital of the former partner, nor that the former partner is to be paid interest on his excess capital.
2. **Dower: FAILURE TO CLAIM: PARTNERSHIP: INTEREST.** Prior to the statute of 1907 (Laws 1907, ch. 49), a widow took no interest in the real estate of her deceased husband, except the right of dower. If dower is not assigned, and she makes no claim therefor, nor in

the proceeds of a sale thereof by the heirs, she will have no interest in such real estate, nor the proceeds thereof, which she can convey by will. Under the facts in this case, it is *held* that she was not entitled to interest upon her share of the personal property which she allowed her sons to use.

3. **Limitation of Actions:** TRUSTS. Her sons, in the management of this business under the circumstances, should be considered as trustees of her interests, and as long as they so held it in trust without questioning her right thereto, the statute of limitations would not run against her claim of an interest in the business.

4. **Appeal:** TRIAL DE NOVO. In appeals in equity, we must try the issues of fact *de novo* without reference to the findings of the trial court. But when witnesses examined in open court disagree radically as to an important fact, we will in determining that fact consider the advantages of the trial court in concluding which version is more probable.

5. **Evidence** indicated in the opinion is *held* to justify the decree as to Oliver Dovey.

APPEAL from the district court for Cass county: EDWARD E. GOOD, JUDGE. *Affirmed in part, and reversed in part.*

John L. Webster, Byron G. Burbank and *D. O. Dwyer,* for appellants.

Jesse L. Root, Matthew Gering, C. A. Rawls and *A. L. Tidd, contra.*

SEDGWICK, J.

After this court had reversed the judgment of the district court in *Dovey v. Schlater,* 99 Neb. 735, and remanded the same to the district court, Schlater, as administrator of the estate of Jane Dovey, deceased, filed an answer and cross-bill therein against the partnership of E. G. Dovey & Son, and asked for judgment thereon. The trial court found in favor of the administrator and entered judgment for $76,520.62. From this judgment E. G. Dovey & Son and George E. Dovey have appealed to this court.

Mrs. Jane Dovey died November 20, 1913, and a few months before her death executed a will whereby she gave all of her estate to two sons of Horatio N. Dovey.

The will was contested, but afterwards confirmed (*In re Estate of Dovey*, 101 Neb. 11), and Schlater as administrator represents the interests of these two sons under the will.

The first contention of the appellant E. G. Dovey & Son is that Jane Dovey, before making the will, had disposed of all her interest in the property of the firm of E. G. Dovey & Son. After the death of their father, the three sons, George E., Oliver C., and Horatio N. Dovey, continued the business of the former partnership of E. G. Dovey & Son, which consisted of Edward G. Dovey and George E. Dovey until in September, 1909, when a disagreement arose among these parties, and Oliver withdrew from the firm, receiving as his share the sum of $50,000, and the business was continued by George and Horatio in the same firm name of E. G. Dovey & Son. The contention is that Mrs. Dovey, who was then living with Horatio, was so desirous of having the controversy between her sons adjusted that she consented to release her interest in the partnership property in consideration of an agreement that each of her sons should give her a specified sum annually for her use and support. The appellants contend that the whole value of the partnership property at that time was $142,796.56, so that $50,000 given to Oliver was more than he would be entitled to upon an equitable division of the estate, and was given him in order to obtain a settlement, in deference to the wishes of their mother, and in consideration that he was to furnish a certain amount annually for his mother, which, together with the amount that the other brothers were to furnish, was to be in lieu of her interest in the assets of the partnership. It is answered to this contention that, prior to this settlement with Oliver, George had received out of the partnership for his personal use much more than either Oliver or Horatio had received, and that the difference would be owing by him to the partnership, thereby in that amount increasing the partnership assets, so that

Oliver did not in this settlement receive a third of the value of the assets. This reasoning we think is fallacious. It is agreed that at the time of their father's death, the value of the partnership property was $52,092.42, of which George was the owner of five-eighths, Horatio and Oliver each one-eighth and their mother one-eighth as the widow of the deceased. It is suggested that as there was no agreement between the parties as to the amount of capital that each should furnish for the business, nor as to interest thereon, the law will presume that they were equal partners, and it was decided by this court in a former appeal that they were equal partners in the profits of the business, but that is as far as this presumption would extend. There would be no presumption that George had agreed that the other two brothers should each have a share of the capital which he had furnished. Therefore, when he drew more than they did from the partnership, the presumption would be that he had with their consent withdrawn so much of his excess capital, and he would not be liable to the firm for the amount withdrawn by him so far as it equalized their investment in the business.

The evidence in regard to the contention that Mrs. Dovey relinquished all interest in the business to these three sons is substantially conflicting, and while in this equitable proceeding we are to try the question of fact *de novo* without reference to the finding of the trial court, it appears that several witnesses examined orally before the court gave conflicting testimony as to important facts, and, considering that the trial court had the opportunity of seeing these witnesses and observing their interest and manner of testifying, this court will, in weighing their testimony, give some consideration to the advantages of the trial court in estimating how much reliance is to be placed upon the conflicting evidence of these witnesses; and, considering all of the evidence so far as we have been able, we are not prepared to arrive at a conclusion upon this point different from that of the

trial court. We conclude, therefore, that whatever interest the widow, Jane Dovey, had in the partnership assets at the time of her decease passed by her will to these legatees.

The important question then is as to the value of that interest, it being conceded that Jane Dovey, as the widow of Edward G. Dovey, deceased, took a one-eighth interest in his personal property. The trial court, after ascertaining the amount and value of the property of the decedent, allowed to the widow the full amount of her share in the estate, together with interest thereon at 7 per cent., computed with annual rests. In this we think the court erred. After the death of Edward G. Dovey, it appears that for many years there was entire harmony among the three sons and their mother, and the sons continued the business jointly, knowing that George was the owner of five-eighths of the business capital and each of the other three the owner of one-eighth. They each withdrew from the business money for their support from time to time, keeping account of all the money withdrawn. They made no contract as to the capital furnished by each, nor the profits that each should have. As before stated, it has been held in prior litigation among these parties that the three sons were equal partners in the business; that is, without any special agreement each would be entitled to an equal share in the profits of the business; and, under all the circumstances of the case, it may, upon the same theory, be presumed that the widow, Jane Dovey, consented that her share of her husband's estate should remain in the business. If the profits of the business during the time from the death of Edward G. Dovey to the entering of the decree appealed from, something over 37 years, had been sufficient to pay 7 per cent. interest on the investment, the value of the business would amount to more than $600,000. That is to say $52,092.42 at 7 per cent. interest, with annual rests during that time, would amount to more than that sum, which is more than the present value of the busi-

ness, together with amounts that the respective parties withdrew therefrom. Mrs. Dovey never made any demand for her share of the capital stock, and under the circumstances in this case it cannot be said that anything was due her from the partnership until some demand was made for settlement, and a refusal to comply with it. There was no express contract between the mother and her sons, and it must be determined from the evidence what contract must be implied. She took no part in the management of the business, and did not in any respect assist in carrying it on. Of course, she would be entitled to have her capital returned to her on demand. But what would be implied from the conditions existing, and the dealings of these parties among themselves, is not so easy a question. She lived with one of her sons, and it is not shown that she shared in the family expenses or contributed anything towards her own support. The sons agreed with her that she should have what money she wanted. Accordingly she received from them various sums of money from time to time as she might call for it. She never asked for interest or profits. She was not interested whether she received 1 per cent. or 7, but received it as due her because of her interest in the property. We think that the strongest implication is that she left her share with her sons, without charge, thinking she had enough for her declining years, and the agreement to give her her share as she might need it from time to time was all she demanded from her sons. Her one-eighth then of her husband's property, less what she had received, was willed to her grandsons.

Jane A. Dovey might have claimed a dower interest in the real estate of her deceased husband. This she never did, and dower was never assigned to her. The land was sold and no dower interest in the proceeds was declared or demanded. When she died her dower rights ceased. Therefore, she had no interest in the proceeds of this real estate that she could convey by will.

The statute of limitations should not be allowed to affect her claim. Her sons, in the management of this business under the circumstances, should be considered as trustees of her interests, and as long as they so held it in trust without questioning her right thereto, the statute of limitations would not run. George Dovey testified to some conversations with his mother indicating that the annual payments that the sons were to make her should be considered in lieu of her interests in the property, but this evidence, if believed and construed most liberally in favor of the defendants, would not be so clear and definite a refusal to longer consider that question open as to amount to a cancelation of the trust and place upon this woman the duty of electing whether she would accept the suggested arrangement, or assert her rights in court.

The record does not show that the defendant Oliver Dovey is a party to this appeal, but his rights are somewhat discussed in the briefs, which perhaps is justifiable, as this is an action in equity in which the conflicting rights of all parties are to be adjusted. He was allowed a small judgment against the partnership for his share of the money received from property of his father which was not included in the partnership business at his father's decease, nor afterwards. This allowance in favor of Oliver seems to be justified by the evidence, and the decree as to him is affirmed. The decree against the partnership is reversed and the cause remanded for further proceedings. Each party will be allowed to amend pleadings and introduce further evidence, if so advised. The costs in this court will be taxed against the adminstrator.

AFFIRMED IN PART, AND REVERSED IN PART.

BELLE AULT GILLESPIE, APPELLANT, V. JULIA AULT TRUKA, APPELLEE.

FILED DECEMBER 26, 1919. No. 20603.

1. **Wills: REVOCATION: UNBORN ISSUE.** A will, not providing for nor showing an intention not to provide for a child subsequently to be born, is revoked *pro tanto* by the subsequent birth of the child.
2. **———: UNBORN ISSUE.** Where a testator devises all of his property to his wife, making no mention in his will of his unborn child, the instrument does not, on its face, manifest an intention that such child shall not be provided for.
3. **Descent and Distribution: HEIRSHIP: PROOF.** "Proof of heirship is not confined to the records of the probate court alone, but may be established by the testimony of any one who knows the facts constituting such relation." *Jetter v. Lyon*, 70 Neb. 429.
4. **———: QUIETING TITLE.** An action to quiet title is an appropriate remedy for the determination of title to land, as between a posthumous child, claiming as heir at law, and one in possession, having a life estate in the land and asserting ownership.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed.*

C. J. Campbell and *H. R. Ankeny*, for appellant.

Sloan, Sloan & Keenan and *J. J. Burke, contra.*

CORNISH, J.

William K. Ault, on March 7, 1888, made his will, bequeathing his entire estate to his wife, the defendant, now Julia Ault Truka. On March 11, following, he died. His will was probated April 13. The plaintiff, his only child and heir at law, was born June 5, 1888. A part of the estate, a 160-acre homestead, has remained in the possession of the wife, who asserts ownership.

This action is to quiet plaintiff's title therein, as posthumous child of the deceased. The district court, finding that it did not have original jurisdiction of the action, and that plaintiff has an adequate remedy at law, dismissed the action. Plaintiff appeals.

Our statute, following a common-law rule, provides that a child, born after the making of a will, shall have the same share in the estate of the testator as if he died intestate, which share shall be assigned to him, "unless it shall be apparent from the will that it was the intention of the testator that no provision shall be made for such child." Rev. St. 1913, sec. 1311. The statute also makes provision for assignment to the child of his share going to him in the county probate court.

The Constitution gives to the county court original jurisdiction of all matters of probate and settlement of estates of deceased persons, and denies to that court jurisdiction in actions in which titles to real estate are sought to be recovered or may be drawn in question. More or less difficulty arises in laying down rules of procedure at once consistent with these two provisions of the Constitution and equitable in practice.

The defendant here urges, mistakenly we believe, that plaintiff's remedy is in the county court; that the question involved is one of heirship, exclusively within the jurisdiction of that court. We have held that the title to real estate passes at once, upon death, to the heir, not by virtue of any administration of the estate or decree of the county court, but directly by operation of the statute of descent. In *Dunn v. Elliott,* 101 Neb. 411, where the county court had erroneously construed a will, and accordingly assigned land to certain heirs, we held that the court's decree, involving, as it did, title to real estate, was ineffectual to finally determine the rights of the parties, although permissible for certain purposes of administration.

On the other hand, we have held that the county court, in the settlement of an estate, has jurisdiction to find who are the heirs of the decedent, which finding is binding upon all parties interested in the estate. *Fischer v. Sklenar,* 101 Neb. 553. In the instant case, the county court might have assigned to the plaintiff the share of the estate going to her. The question of heirship was

never determined by the county court. That the plaintiff is the sole child and heir at law of the deceased is not and never has been a controverted issue of fact. The county court merely found that the will in controversy was his last will and testament.

The contention that this question of fact, so arising, is exclusively for the county court is not well taken. Being a fact upon which title may depend, and questions of title not being within the jurisdiction of that court, the law in such a case gives to the court in which the question of title may arise concurrent jurisdiction. As said in *Fischer v. Sklenar, supra* (p. 560): "We have held that heirship may be proved in many ways. *Jetter v. Lyon,* 70 Neb. 429."

A will, not providing for nor showing an intention not to provide for a child, subsequently to be born, is revoked *pro tanto* by the subsequent birth of the child, and the child inherits, not by the decree of the court, but the title passes by the statute.

It is also contended that the act to quiet title is not the appropriate remedy, and that plaintiff has a remedy at law. If we assume that the plaintiff is an heir possessing title, and that the defendant, in possession with life estate, disputes the title and claims ownership, then it follows, as we held in *Criswell v. Criswell,* 101 Neb. 349, that an action to quiet title is the appropriate remedy.

For other cases bearing upon the questions considered, see *Evans v. Anderson,* 15 Ohio St. 324; *Chicago, B. & Q. R. Co. v. Wasserman,* 22 Fed. 872; *Breidenstein v. Bertram,* 198 Mo. 328; *State v. O'Connor,* 102 Neb. 187; *Smith v. Robertson,* 89 N. Y. 555; 2 Alexander, Commentaries on Wills, sec. 632.

REVERSED AND REMANDED.

SEDGWICK AND ALDRICH, JJ., not sitting.

LILLIAN LIVINGSTON, APPELLANT, v. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 26, 1919. No. 20489.

1. **Carriers:** CONFLICT OF EVIDENCE: DOCTRINE OF RES IPSA LOQUITUR. When, in an action against a common carrier for personal injuries, the testimony conflicts as to whether plaintiff's injuries were sustained while she was a passenger and about to alight or whether they were sustained at a distance of six or eight feet from the car after she had safely alighted, the rule of *res ipsa loquitur* does not apply.
2. **Witnesses:** PRIVILEGED COMMUNICATIONS. When plaintiff offers testimony in chief tending to prove freedom from venereal disease, it is competent for defendant to offer testimony tending to show that plaintiff called upon and was examined by a physician, but such physician cannot testify as to the result of his examination.
3. **Appeal:** CONFLICT OF EVIDENCE. When the testimony conflicts, the judgment will not be set aside unless the verdict is clearly wrong.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Stout, Rose & Wells and *M. O. Cunningham,* for appellant.

John L. Webster, Herbert J. Connell and *William M. Burton, contra.*

DEAN, J.

Plaintiff sued to recover $50,650 for personal injuries alleged to have been sustained because of defendant's negligent control of a street car as she was about to alight. Defendant recovered verdict and judgment, and plaintiff appealed.

Respecting the facts immediately attending the accident, plaintiff testified in substance that she arrived at her destination in Council Bluffs about midnight; that just before alighting and while standing in the exit aisle the car suddenly lurched and she was thereby thrown

so that her head came in contact with one of the metal hand-rails with such violence that she was rendered unconscious. Della Gilday on the part of plaintiff testified that the accident happened in front of her home, and that she was standing in her front doorway when the car came up; that from there she could see that "Miss Livingston started for the back end of the car, and the conductor was on the inside, with the door closed, and Miss Lillian walked out to the end of the car and went out and closed the door, and in the rough stop of the car she bumped against the railing and was pushed off the car;" that plaintiff fell in a sitting posture and was lying unconscious a little east and away from a plank crosswalk at the intersection when witness reached the car. A photograph in evidence shows that the plank walk is of usual width. The evidence is undisputed that, about "four or five steps from the car track," there is a hole in the walk large enough to permit a person's foot to go through as Miss Gilday testified. It is defendant's contention that plaintiff alighted safely, and that she stepped in this hole and fell, and that such fall was the proximate cause of her injury.

Thse witnesses were called by defendant: Paul Lowry, a passenger, testified that the car was standing still when plaintiff alighted; that there was neither a "lurch" nor a "jerk;" that he saw her throw up her hands and fall directly over the hole in the walk; that when the car stopped the plank walk was directly opposite the back step. To substantially the same effect was the testimony of Ed. Lowry who was a passenger. He also testified that he saw plaintiff when she left her seat, and when next he saw her she was lying on the plank walk with one foot in the hole. Another passenger testified that the car stopped without any unusual movement. The motorman testified that the car stopped without either a "lurch" or a "jerk;" that, hearing no starting signal, he looked into the mirror that reflects the back end of the car, and upon discovering that the conductor was on the cross-

walk, he went back and saw plaintiff "lying over the hole in the crosswalk" about six feet from the car steps. The conductor testified that as the car stopped plaintiff followed him from her seat in the car to the rear platform and alighted on the walk; that after taking two or three steps "she seemed to kind of lose her balance and throw up her hands and she fell;" that he immediately went to her relief and, raising her up, he found that her foot was in the hole in the walk.

Plaintiff argues that her testimony and that of Della Gilday "to the effect that there was a jerking of the car at the time she was about to alight," and that her injury resulted therefrom, raised a presumption of defendant's negligence, and that the jury should have been so instructed. In support of her contention plaintiff cites *Lincoln Traction Co. v. Shepherd,* 74 Neb. 369, on rehearing 374. We do not think the case cited supports the argument. In the present case the testimony was in direct conflict as to whether plaintiff's injuries were sustained while she was yet a passenger and about to alight or whether they were sustained at a distance of six or eight feet from the car after she had safely alighted. Plaintiff did not offer an instruction embodying the rule for which she contends, nor were the jury so instructed. In view of the rule announced in the *Shepherd* case, we hold that the court did not err in the premises.

In the direct examination, with respect to her physical condition before the accident, plaintiff testified that she never had "any venereal disease or taint," nor had she taken treatment for any ailment of that sort. Dr. Elizabeth Lyman is the examining physician for the juvenile court. She testified that it was her duty to examine those coming under its care, that in her official capacity she examined plaintiff in 1911, when she was brought by the juvenile authorities to her for that purpose, and that from the examination she reached a conclusion as to plaintiff's then physical condition; that in 1912 plaintiff came voluntarily and received treatment. On objection by

plaintiff the witness was not permitted to testify respecting plaintiff's condition in 1911, nor as to whether she discovered anything abnormal in her condition in 1912. Defendant called Dr. Van Fleet, who was permitted, over objection, to testify that plaintiff had called on him for an examination before her marriage and before the accident. But he was not permitted to answer this question: "For what purpose, or to determine what, was that examination made?" Subsequently defendant made this offer: " The defendant offers to prove by this witness (Dr. Van Fleet) that the examination was made to determine whether or not she was pregnant and that—" By her counsel: "Since that is the ruling of your honor I will let the witness answer it. If your honor has doubt of the propriety of it, as far as this question is concerned, he can answer." The objection being withdrawn, we do not think the court erred in the premises, and in view of plaintiff's direct testimony we do not think that error can be predicated on the court's refusal to instruct that the testimony of Dr. Van Fleet and Dr. Elizabeth Lyman was withdrawn from consideration by the jury.

Other errors are assigned having mainly to do with the nature of plaintiff's injuries, the treatment, and the like, but in view of our decision we do not find it necessary to discuss the assignments so pointed out. We think the court did not commit prejudicial error in respect to instructions given or refused. The testimony conflicts, but there is sufficient to support the verdict.

The judgment is

AFFIRMED.

ROSE AND SEDGWICK, JJ., not sitting.

STEPHEN A. MOORE, APPELLEE, V. NETTIE L. MOORE, APPELLANT.

FILED DECEMBER 26, 1919. No. 20647.

1. **Pleading:** PETITION: SUFFICIENCY ON APPEAL. "Where a petition is for the first time assailed in this court because of its alleged failure to state a cause of action, its allegations will receive a liberal construction, with a view of giving effect to the pleader's purpose, and, if possible, sustaining the petition." *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1.
2. ———: ———: ———: CONSTRUCTION BY PARTIES. "A reviewing court will not only liberally construe a petition thus assailed, in order to uphold it if possible, but will view it in the light of the entire record; and where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on such petition, this court will not ignore such construction in ruling on the sufficiency of the petition, even though the petition standing alone might not admit of such construction." *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1.
3. ———: ———: AIDER BY ANSWER. "A defective or ambiguous petition may be aided and its infirmities cured by the averments of the answer." *Beebe v. Latimer*, 59 Neb. 305.
4. ———: FAILURE TO REPLY: WAIVER. "Where no reply is filed, and a cause is tried and submitted on the theory that a material allegation of the answer is in issue, a claim that such allegation stands admitted comes too late, when made for the first time after verdict." *In re Estate of Cheney*, 78 Neb. 274.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

L. B. Day and *Prince & Prince*, for appellant.

J. B. Randolph and *John O. Yeiser, contra.*

DEAN, J.

Pursuant to his petition, plaintiff obtained a decree of divorce. Defendant in her cross-petition prayed that the petition be dismissed, and that she "have a decree of separate maintenance." Her cross-petition was dismissed, and she appealed.

Defendant on appeal presents only two questions: "First. That the pleadings conferred upon the court of Douglas county no jurisdiction. Second. That the evidence in the case shows that Stephen A. Moore had not been a resident of the state of Nebraska for a sufficient length of time to be entitled to maintain the action."

In the petition it is alleged: "(1) Plaintiff is and has been a resident of Nebraska for more than two years before the commencement of this suit." In her answer and cross-petition defendant denies plaintiff's allegation respecting residence, and alleges that her husband left the state in September, 1916, and established his residence elsewhere; that "plaintiff has not a *bona fide* intention of making Omaha, Douglas county, Nebraska, his permanent home; that he came to Omaha, and that he is now residing in Omaha, for the sole and only purpose of maintaining and prosecuting this action for a divorce against the defendant; * * * that the defendant is a resident of Omaha, Nebraska, and has been a resident of said Omaha, Nebraska, since the 19th day of May, 1917; that defendant took up her residence in Omaha, Nebraska, for the purpose of contesting this divorce action."

For the first time the petition is assailed here on the ground of alleged failure to state a cause of action. We have held that under such circumstances a petition should be liberally construed and considered in the light of the answer, the testimony, and of the record generally, to the end that, if possible, effect may be given to the pleader's purpose and the petition sustained. *Chicago, R. I. & P. R. Co. v. Kerr,* 74 Neb. 1. The allegations of the petition and the answer, when considered together, seem to us to bring the case within sections 1567, 1569, Rev. St. 1913, and together they sufficiently plead the jurisdictional facts.

There is evidence tending to prove that plaintiff has been a resident of Nebraska since 1913, and that he was for the most of the time during that period in the employ

of the Union Pacific Railroad as a machinist. It seems that one so employed might be at his permanent residence but a part of the time, and yet it would remain his legal residence. From the evidence it appears that when the petition was filed, and for some time prior thereto, the parties both resided at Omaha. Plaintiff points out that defendant pleads in her answer that her husband is residing in Omaha, and that his residence there is only for the purpose of prosecuting this action. From this he argues that defendant's plea respecting his place of residence and her allegation that it is made for a fraudulent purpose became a material issue tendered by her, and that, such issue having been resolved by the court in his favor, the finding of the court on a disputed question of fact should not, under repeated decisions, be disturbed unless it is clearly wrong. In view of the record we think the court did not err in the premises.

Defendant complains because no reply was filed. But the case was evidently tried on the theory that the allegations of the answer and cross-petition were denied, and in that case the reply is deemed to be waived where, as in the present case, objection was not made until after judgment. *In re Estate of Cheney*, 78 Neb. 274.

We conclude that the record sufficiently shows that the court was clothed with jurisdiction to hear and to determine the controversy. The judgment is therefore

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

C. F. IDDINGS COMPANY, APPELLANT, V. LINCOLN CONSTRUCTION COMPANY ET AL., APPELLEES.

FILED DECEMBER 26, 1920. No. 20653.

1. **Bridges: MATERIALS: STATUTORY BOND: OBLIGATION OF SURETY.** Labor and material entering into and actually used in the performance of a contract made under the provisions of section 3840,

Rev. St. 1913, is within the obligation of a surety company executing a bond pursuant to the statute.

2. ———: ———: ———. ———: A bond given under statute for construction of a public bridge will be construed in connection with the provisions of the statute authorizing it, and the obligors must consider coal furnished and used in carrying on the work as within the obligation of the bond.

3. ———: CONTRACTOR'S BOND: CONSTRUCTION OF STATUTE. Section 3840, Rev. St. 1913, is remedial in its nature, and must be liberally construed to give proper force and effect for the benefit and protection of labor and materialmen.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Halligan, Beatty & Halligan, for appellant.

Strode & Beghtol and *W. E. Shuman, contra.*

ALDRICH, J.

The C. F. Iddings Company, a corporation, existing under and by virtue of the laws of Nebraska, brings this action against the Lincoln Construction Company, a copartnership, and the United States Fidelity & Guaranty Company as surety on the bond of the construction company, to recover $863, alleged to be due for material furnished by plaintiff and used by defendant in constructing a bridge over the North Platte river in Lincoln county. The bond was conditioned as follows: "Now if the said Lincoln Construction Company shall faithfully keep and perform each and every one of the stipulations and agreements contained in the said contract, plans, specifications and proposals at the time and in the manner therein specified and pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for materials furnished or services rendered to said party of the first part in executing or performing the obligations of said contract, so that each of such persons may receive his just dues in that behalf, then this obligation to be void; otherwise to be and remain in full force and effect in law."

The finding of the trial court followed the principles laid down in *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27. In pursuing its course of reasoning the trial court held: "Under the rule announced in this state in the case of *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27, that the coal used by the defendant Lincoln Construction Company in generating steam to furnish power in the prosecution of the work of constructing said bridge and embankment did not enter into the construction of said bridge and embankment to the extent that the defendant United States Fidelity & Guaranty Company is liable therefor as surety on its bond, for the Lincoln Construction Company."

The trial court further found: "The defendant United States Fidelity & Guaranty Company, as surety for the plaintiff, is not liable under its bond for the coal so furnished by the plaintiff herein to the defendant, the Lincoln Construction Company, and used as herein set forth."

The bond sued upon was given in conformity with section 3840, Rev. St. 1913. It follows that the parties to this litigation executed and delivered a statutory bond; that the bond must be interpreted and construed in connection with the provisions of this statute; that this statute gives to the bond a certain legal effect that is as much a part of the bond as though its terms were incorporated therein. When a bond is given under authority of above statute in force when it is executed, if there is nothing to show a different intention of the parties, then it will be presumed the bond was executed as is by law provided. But a legislative enactment was not intended to import to an instrument an effect different than was intended by the parties. 9 C. J. 34, sec. 56.

In this connection section 3840, Rev. St. 1913, was enacted to meet a situation often arising where labor and materialmen are without protection by the mechanics' lien law. The proposition is to require contractors, in public works, to give bonds conditioned for faithful per-

formance of their duties. The practice is for these contractors to insure labor and materialmen against whatever loss they might sustain growing out of public work. 18 R. C. L. 881, sec. 9; *Knight & Jillson Co. v. Castle,* (172 Ind. 97) 27 L. R. A. n. s. 573, and note, 579. The obligation against the defendant surety company, it must be held, was pursuant to statute, section 3840, *supra.*

By virtue of the above discussion, labor and materials used in public works, whether furnished directly to a contractor or subcontractor, must be deemed within the obligation of a surety company under a bond executed pursuant to statute. The statute in this class of cases is the guide fixing the liability of the surety company, and we are constrained to follow it. The legislature intended to fix and did establish liability in a situation like the instant case, and to this extent *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co., supra,* by virtue of statute has no application. The bond sued upon in that case was given before section 3840, Rev. St. 1913, was enacted, and has no application to a suit on a statutory bond. *United States v. American Surety Co.,* 200 U. S. 197; *Brogan v. National Surety Co.,* 246 U. S. 257.

In this connection here we have bonds given under this statute, and they should be liberally construed to effectuate their purpose. Release of sureties, through mere technicalities, is not to be encouraged. The statute in question fixes liability of the contractor in furnishing coal for steam hoist. It is the spirit and intent of section 3840, *supra,* to obligate a surety company to pay for material which is "actually used in the erecting, furnishing, or repairing of the building or in performing the contract." To permit anything else would be to deny the statute an opportunity to function as per the intent and purpose of the legislature. *United States v. Massachusetts Bonding & Ins. Co.,* 198 Fed. 924.

The use of coal in question is essential in entering into public works. It would be impractical in modern construction, where it is necessary, to move large amounts

of dirt, to hoist iron structures, and to move heavy rocks, without operating a hoisting engine, and that takes coal. It would seem under a liberal construction that fuel so used was necessarily one of the component parts of this contract.

Section 3840, Rev. St. 1913, is in its nature remedial, and must be liberally construed to give proper force and effect in the protection of materialmen. It was error to hold that plaintiff, furnishing coal for the hoisting engine, could not collect from defendant surety company. The finding of the trial court refusing to impose liability upon defendant surety company is squarely against statutory provision, and for that reason, among others, this case must be reversed and remanded.

REVERSED.

LETTON AND SEDGWICK, JJ., not sitting.

WARREN WILLMAN, TRUSTEE, APPELLANT, V. RUDOLPH PETERSON ET AL., APPELLEES.

FILED DECEMBER 26, 1919. No. 20826.

Bankruptcy: FRAUDULENT CONVEYANCE: EVIDENCE. Evidence examined, and *held* to show no fraudulent conveyance of the real estate.

APPEAL from the district court for Phelps county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

F. L. Carrico and *Dravo & Dilworth,* for appellant.

A. J. Shafer and *H. M. Sinclair, contra.*

ALDRICH, J.

This is an action in equity growing out of alleged fraudulent alienation of real estate.

The plaintiff, as trustee in bankruptcy of Rudolph Peterson, brought this action against the bankrupt and his wife, Anna Peterson, to force one certain eighty acres of land in Phelps county into assets, so the same could be applied in payment of a debt owing to the Exchange Bank of Wilcox.

The defendants occupied this eighty acres in controversy from some time in 1907 until 1913 as a homestead. The defendant husband, desiring to borrow money in 1912, found it necessary to procure a loan on the homestead. For several months the wife steadily refused to join him in a mortgage. Finally, however, in October, 1912, it was orally agreed that she would sign, and she did sign the mortgage, provided he would deed the eighty acres to her, part consideration therefor being an indebtedness of him to her of $1,599. The defendant husband agreed to and did so in February, 1915.

The deed shows that the land was then valued by the defendants at $5,000, which seems to be a reasonable and fair valuation, although another witness, an interested party, the same as the defendant, testified in an off-hand way that he believed the land was worth $80 or $90 an acre in 1917. It appears that the original purchase price in 1907 was $5,000, and it does not appear that the land in that county had greatly increased in value from the time of purchase to the time of making the oral agreement in 1912. It also appears from the record that there were valid existing incumbrances of $3,529, in addition to indebtedness owing to his wife of $1,599, making $5,128 in all. Thus it appears from the record that the defendant husband has no property interest in and to the land. The wife gave a full and valuable consideration for these premises at the time the oral contract was entered into. Her ownership and interest in this land should not be disturbed. Counsel for plaintiff has made careful and painstaking investigation of the matter involved, and he has submitted a valuable brief. We do not doubt that it states the law, but the difficulty in applying his principles is that the defendant husband for sufficient consideration had, in a *bona fide* transfer, disposed of all his interest in and to these premises.

In view of these propositions, other errors assigned do not need further consideration.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1920.

WALLACE H. MANION v. STATE OF NEBRASKA.

FILED JANUARY 17, 1920. No. 21111.

1. **Criminal Law**: LARCENY: WITNESSES: COMPETENCY. In a prosecution for the larceny of automobile tires, a dealer in automobile accessories who has purchased at wholesale, and sold at retail, automobile tires of the character described in the information, at the place the larceny is alleged to have been committed, over a period of two years, is a competent witness as to the value of the stolen property.
2. ———: EVIDENCE: ADMISSIBILITY. In establishing the identity of stolen automobile tires, the state was permitted to show the numbers on the tires and the numbers on the invoice received at the time the tires were purchased. In the invoice the numbers were listed as D-53457, -679, -745, etc., without repeating the D-53 before each number. On the tires the D-53 was in each case written as part of the number. It was shown that this was a mere serial number, and that it was not customary to use it except with the first number on the invoice, unless the serial was changed. *Held*, the discrepancy did not render the invoice inadmissible.
3. **Larceny**: SUFFICIENCY OF EVIDENCE. Evidence *held* sufficient to sustain the verdict.
4. **Criminal Law**: PRIVY VERDICT. May 29, 1919, after the jury in a felony case had retired to deliberate upon a verdict, the court made an order adjourning the regular May, 1919, term until June 10. May 30, the following entry was made: "The jury send word to the judge of the court that they have arrived at a verdict. This being a legal holiday, and the court not being in session, court is opened by the judge thereof solely for the purpose of receiving the verdict of the jury." The regular proceedings were had. Defendant

was present and made no objection. The concluding statement of the record is: "Thereupon court is closed for the day by order of the court." *Held*, that the verdict was not a "privy verdict" as being received in vacation time.

ERROR to the district court for Nuckolls county: RALPH D. BROWN, JUDGE. *Affirmed.*

John C. Hartingan and *H. H. Mauck*, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

MORRISSEY, C. J.

Defendant was convicted of grand larceny in the district court for Nuckolls county, for stealing 12 automobile tires, and was sentenced to serve from one to seven years in the penitentiary. From this conviction, he brings error.

On the night of May 1, 1918, the garage of Lockwood, Jackson & Company, at Nelson, was entered, and 12 automobile tires were taken from the store-room. These tires were found on the following day in the possession of one Stephenson, a garage man at Superior. Stephenson, as a witness for the state, testified that he received them from defendant. Defendant denied that he ever negotiated with Stephenson for the sale of the tires, and disclaimed any knowledge of, or part in, the larceny.

Error is predicated upon the admission of the testimony of Lockwood as to the value of the stolen tires. It is claimed that the proper foundation had not been laid, and that the witness was permitted to testify as to the wholesale and retail price of the tires without any knowledge shown of their true value or condition. This objection is not well taken. Lockwood was the manager of the garage from which the tires were stolen. He had purchased tires of this brand from time to time during a period of two years, had ordered these identical tires, and his testimony shows a familiarity with both wholesale and retail prices.

The admission of certain testimony to establish the identity of the property is also complained of by defendant. It is said that this testimony is based upon a comparison of the numbers stamped on the tires with those contained in the invoice, and that these numbers did not correspond. In the invoice the tires were set out as D-53457, -679, -745, etc., without repeating the D-53 before each number. On the tires the D-53, or D-54, was in each case added as part of the number. Lockwood explained that this was a mere serial number, and that it was customary not to use it except with the first number on the invoice, unless the serial was changed. This is undisputed. It cannot reasonably be said, therefore, that there was a discrepancy between the numbers on the invoice and on the tires, and this evidence of identification was properly admitted. This also applies to the other exhibits of the same general class offered by the state. Nor was it error, in view of the other evidence as to value, to refuse to exclude the invoice because it showed the cost of the tires.

By another assignment, complaint is made of the admission of the evidence of two witnesses calculated to show the time required to drive such an automobile as that described by the witness Stephenson from Superior to Nelson and return. It is claimed that no foundation was laid for this testimony. In view of the record, taken as a whole, this assignment is not well founded.

It is also argued that the evidence is insufficient to support the verdict. It will serve no useful purpose to set out the details of the evidence; a general summary is sufficient. According to the testimony of Stephenson, defendant had offered to sell him tires such as those described in the information. Stephenson loaned him an automobile for use in bringing the tires to Superior. Late in the night Stephenson found this automobile loaded with the tires, at the back door of his garage. He drove the automobile into the garage, and soon thereafter defendant entered. There was a discussion between them relative

to the tires. Defendant expressly denies the story told by Stephenson in so far as it tends to connect him with the crime, but admits an acquaintance with Stephenson, and that he had on other occasions talked with Stephenson with a view of securing employment in his garage. Defendant undertakes to account for his whereabouts during the entire night. He does appear to account for his time during the night, not only by his own testimony, but by that of disinterested witnesses, with the exception of about one and one-half hours when he claims to have been alone in his room in a hotel. According to the theory of the state, it was during this time that he committed the crime of which he has been convicted.

There are circumstances in connection with Stephenson's story that are calculated to arouse suspicions of his honesty in the transaction. He was tried on the charge of having received the tires, knowing them to have been stolen, but was acquitted. Whether he received the tires in good faith or with a dishonest motive is not material here. The jury were not bound to accept as true the entire story told by Stephenson. They may have doubted his entire innocence, but believed so much of his testimony as was material in the cause before them. Nor were the jury bound to believe the story told by defendant. There is sufficient evidence in the record to sustain the verdict, and it will not be disturbed.

The final point raised by defendant is that the verdict was received in vacation, and hence is void as a privy verdict. The cause was submitted to the jury May 29, 1919. While the jury were deliberating upon the verdict, the court entered an order adjourning the regular May, 1919, term until June 10. May 30 the following entry was made: "The jury send word to the judge of the court that they have arrived at a verdict. This being a legal holiday, and the court not being in session, court is opened by the judge thereof solely for the purpose of receiving the verdict of the jury." In the case of *Back v. State,* 75 Neb. 603, we held: "Where the record shows an order adjourning a term of the district court to a

future day, and judicial proceedings in the interval, it will be presumed, if necessary to support the jurisdiction of the court over such proceedings, that the order of adjournment was vacated, and the court reconvened." Defendant's contention is that the words, "the court not being in session," used in the journal entry, conclusively show that the court did not reconvene, and that the rule quoted is not applicable. The record shows that the regular practice was followed in the reception and entering of the verdict. Defendant was present in the room; the jury was regularly brought in by the sheriff; the verdict was handed to the clerk and read; and the jury affirmed it. The concluding statement of the court's entry is: "Thereupon court is closed for the day by order of the court." Defendant made no objection to the proceedings. Reading the journal entries in their entirety, they fail to sustain defendant's contention. It was not a privy verdict.

The record is free from error, and the judgement is

AFFIRMED.

JOHN WALLA ET AL., APPELLEES, V. JACOB KAVAN, APPELLANT.

FILED JANUARY 17, 1920. No. 20467.

1. **Judgment:** RES JUDICATA. Evidence examined, and held that the decree in the case of *Shavlik v. Walla*, 86 Neb. 768, did not adjudicate the issues in the case, and that the injunction complained of is warranted by the evidence.
2. **Appeal:** BRIEFS. Rule 12 (Supreme Court Rules, 94 Neb. XI) should be observed by counsel in the preparation of briefs, since it is much to the interest of their clients that the court be aided in ascertaining the real issues. Unless briefs are so prepared, they are subject to be stricken on motion of the adverse party, at the discretion of the court.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Charles H. Slama, for appellant.

J. H. Barry and *Wymer Dressler, contra.*

LETTON, J.

The plaintiffs and defendants are respectively owners of farm lands situated in the Platte valley. Near their lands is a natural drainage channel, known as "Kunesh Hollow," which drains about 1,000 acres of land, and prior to 1884, after heavy rains, discharged large quantities of water upon the level bottom lands at its mouth. At that time, in order to prevent the destruction of their crops, a number of the owners of land near the point where the hollow debouched, by agreement, dug a ditch which carried the waters to a low pond or swale which lay to the northwest. In the course of time the eroded matter filled the ditch and this depression.

In 1907 an action was brought by one Shavlik against Philip Walla, one of the defendants in this suit, to enjoin him and others interested from maintaining the ditch, and an injunction was allowed. This decree was appealed to this court, where it was modified, the court saying: "We think this imposes upon defendants too great a burden in two particulars: (1) They should not be compelled 'to fill up' the entire ditch. If they take the proper steps to prevent the water from flowing through it, whether by filling or by any other method which will accomplish that end, they will do all that plaintiff has a right to demand. (2) If they take such steps as will restore the outlet of Kunesh Hollow to 'the same condition, as nearly as may be, as it was before they constructed the said ditch' they will do everything that the law requires." A full statement of the facts may be found in *Shavlik v. Walla*, 86 Neb. 768.

In pursuance of this decree, the defendant Kavan constructed a dam across the hollow or ditch, at a point near the southeast corner of his land in section 21. He also dug a ditch leading in a northeasterly direction, terminating at the ditch upon the side of the right of way of the defendant railway company, so that the waters were collected and made to run through these ditches, passing under the railway track, and spreading out over

the lands of the plaintiffs, injuring and destroying their crops. This action was brought to restrain the maintenance of the dam and ditch, and for damages.

Defendant Kavan alleges that prior to 1884, when the first ditch was dug, none of the waters from Kunesh Hollow flowed upon his land, except at a time of extraordinary floods, when it received only a small fraction of the overflow. He also alleges that, in strict obedience to the decree in the *Shavlik* case, he filled in the ditch at the exact point where the water, prior to 1884, turned northeast, and was therefore justified in his proceedings. He also pleads former adjudication by the *Shavlik* decree, and the general issue. The trial judge, at the request of the parties, made a personal inspection of the premises. The court made full and detailed findings of fact, and rendered judgment requiring defendant Kavan to abate and remove the dam, and to restore Kunesh Hollow to the condition it was in prior to 1884 as nearly as may be possible. From this decree defendant Kavan appeals.

The principal argument of defendant is that the issues herein were formerly adjudicated in the *Shavlik* case, and that the matter is *res judicata.* Plaintiffs do not dispute the legal principle, but contend that it is inapplicable under the facts. In the *Shavlik* case the defendants were required to restore the outlet of Kunesh Hollow as nearly as they could to the natural conditions. The evidence in this case shows that, by the construction of the dam and the new ditch, waters were collected and discharged through the railroad ditch upon plaintiffs' lands in much greater volume and to their greater damage than before, when only small quantities, after heavy storms, reached the lands. The issues in the *Shavlik* case did not involve the issues here. In fact, this case begins after, and is based upon, the decree in the *Shavlik* case.

The findings of the trial court are warranted by the evidence.

AFFIRMED.

DAWSON COUNTY, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT.

FILED JANUARY 17, 1920. No. 20623.

1. **Drains: BRIDGES ON HIGHWAYS: DUTY TO MAINTAIN.** It is the duty of the owners of irrigation canals or ditches to construct and keep in repair bridges on highways crossed by their ditches or canals.
2. **———: ———: REPAIRS.** If the owner of the canal refuses to repair, when notified by the county authorities, the county may proceed to repair, and is entitled to recover the reasonable cost of the repairs from the owner.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

E. A. Cook and *W. M. Cook*, for appellant.

N. M. York, contra.

LETTON, J.

The defendant is a corporation operating an irrigation system in Dawson county. It built a number of highway bridges over its canals and ditches. In the course of time some of these bridges became out of repair. The county requested the irrigation company to repair them, but it refused, on the ground that it was under no obligation so to do. The county authorities then caused the bridges to be repaired, and brought this action to recover the cost of the repairs. The district court rendered judgment for the county. Defendant appeals.

There is no dispute about the facts. The only question is whether it is the duty of the irrigation company or the duty of the county to repair and maintain the bridges.

The irrigation act of 1895 (Laws 1895, ch. 69) contained a special provision with regard to the erection and maintenance of bridges over irrigation ditches and canals. It provided that irrigation companies should erect bridges, that "thereafter such bridge or bridges shall be controlled and maintained by the county." Section 58.

There was then in force another statute which required the owners of railroads, canals or ditches to maintain and keep in repair good and sufficient crossings on all public or private roads crossed by railroad or canal necessary to enable the road to pass over or under any highway. In *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, it was held that that portion of the act of 1895 which relieved irrigation companies from maintaining and keeping in repair bridges across their canals was special legislation, and therefore unconstitutional.

The general act applying to owners of railroads, canals and ditches was amended in 1913, so as to make it apply to railroads only, so that at the present time there is no statute providing that irrigation companies, mill owners, or any others, cutting or crossing a highway with canals or ditches, shall keep the crossing in repair.

Section 3446, Rev. St. 1913, now in effect, provides that "any person, company, corporation or association constructing any ditch, lateral or canal upon or across any highway shall keep such highway open for safe and convenient travel," and further provides in detail the dimensions and character of the bridges to be constructed.

The appellant contends that because there are general provisions in the statutes requiring counties to keep highways and bridges in repair, and there being no statute making it the duty of canal companies to do so, it is the duty of the county to maintain the bridges erected by the canal company. The county takes the position that, there being no statute applicable, the common law applies.

We are inclined to the view that the provisions in section 3446, Rev. St. 1913, that any one constructing a ditch, lateral or canal across a highway, "shall keep such highway open for safe and convenient travel," impliedly require the repair of bridges upon such highways to be made by the owner of the canal or lateral. But, without regard to this statute, we are of the opinion that, in the absence of a specific statute, the common law applies.

Franklin County v. Wilt & Polly, 87 Neb. 132; *State v. Papillion Drainage District*, 89 Neb. 808; *Richardson County v. Drainage District*, 92 Neb. 776, 779.

Sections 2956, 2960, Rev. St. 1913, providing for the repairing of bridges by counties, have no reference to bridges across such canals or ditches. The provisions of the statute with respect to emergency repairs to county boards apply in so far that the county is required to act promptly. It should do so through notification to the canal owners, if quick action can be best had in that manner, or directly if necessary for the safety of the public, it being the duty of the county authorities to take all necessary steps to prevent accidents upon the roads and bridges. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

FRED L. SPEAR, RECEIVER, APPELLEE, V. FRANK OLSON ET AL., APPELLEES: LEWIS PETERSON ET AL., APPELLANTS.

FILED JANUARY 17, 1920. No. 20999.

1. **Corporations**: NOTICE OF INDEBTEDNESS: RIGHT OF ACTION. "The liability of a stockholder in a corporation for failure of the corporation to publish notice of indebtedness required by section 577, Rev. St. 1913, is in the nature of a penalty for neglect of duty. One stockholder, who is equally in fault in that regard with all other stockholders, cannot maintain such action, as creditor of the corporation, against the other stockholders." *Singhaus v. Piper*, 103 Neb. 493.

2. ———: ———: LIABILITY OF STOCKHOLDERS. Stockholders in corporations which are in default for want of the annual notice of indebtedness, are not liable for debts of the corporation incurred before default.

3. **Notes**: PRE-EXISTING DEBT: DISCHARGE. A note taken for a pre-existing debt will not discharge the original obligation, unless it is taken in payment of the debt by agreement.

4. **Corporations**: NOTICE OF INDEBTEDNESS: STATUTE: CONSTITUTIONALITY. Section 577, Rev. St., 1913, is not in violation of section 4, art. XIb of the Constitution, providing for the liability of stockholders.

APPEAL from the district court for Nance county: GEORGE H. THOMAS, JUDGE. *Reversed.*

John J. Sullivan, John C. Martin and *George B. Thummel*, for appellants.

Albert & Wagner, W. L. Rose, George F. Rose, Albert Thompson and *J. H. Kemp, contra.*

LETTON, J.

Action by the receiver of an insolvent corporation against stockholders upon an alleged statutory liability for failure of the directors to publish an annual statement of the financial condition of the corporation. A judgment was rendered as prayed. Certain stockholders appeal.

The corporation never published any statement of its indebtedness. The allowed claims exceeded the assets of the corporation over $14,000. The receiver made an assessment against the stockholders upon their statutory liability for an amount sufficient to pay the debts and the expenses of the receivership. Six of the defendants filed a separate answer consisting of a general denial; an allegation that the indebtedness of the corporation to the First National Bank of Genoa, Nebraska, was contracted prior to the failure to publish the annual statement of indebtedness; that four of the alleged creditors have always been and still are stockholders of the corporation; that the money loaned by them was loaned at a time when they knew that the notice had not been published, and that they are now estopped from asserting any claim in equity against the defendants. The reply is a general denial. The case was tried on a stipulation of facts which shows: That the indebtedness to the First National Bank of Genoa was originally incurred in October, 1911, which was before the corporation was in default of notice; that the debt was evidenced by a promissory note for $6,000, payable in six months; that the original indebtedness was afterwards renewed from time to time without additional money being advanced or loaned, new notes being given

as evidence thereof; that certain defendants, whose claims had been allowed against the corporation, were at the time of the incurring of the liability directors of the same, and knew of the default in publication at the time of making the loans.

1. The original indebtedness to the First National Bank of Genoa was incurred while the corporation was not in default of publishing the notice. The question to be determined is whether, if a debt is renewed and new notes given after default, the creditor is entitled to the benefit of the statute.

The general rule is that a note taken for a pre-existing debt will not discharge the original cause of action, unless it is taken in payment of the debt by agreement. The renewal of a note by giving a new note does not pay the original debt, and, unless it is so agreed, it does not pay the original indebtedness, and does not create a new indebtedness. *Harvey v. First Nat. Bank,* 56 Neb. 320, 334; *Leschen & Sons Rope Co. v. Mayflower Gold Mining & Reduction Co.* 173 Fed. 855, 35 L. R. A. n. s. 1; *Griffin v. Long,* 96 Ark. 268, 35 L. R. A. n. s. 855.

The recitation in the stipulation that the "original indebtedness" was renewed must be taken to mean that the original indebtedness continued its identity although successive notes were given to evidence its renewal. We have repeatedly decided that stockholders are not liable under the statute for debts incurred before the corporation was in default in publishing the notice. *Smith & Crittenden v. Steele,* 8 Neb. 115; *Howell Bros. v. Roberts,* 29 Neb. 483; *Singhaus v. Piper,* 103 Neb. 493.

2. A number of the stockholders are also creditors, and the judgment of the court includes the debt due such stockholders.

In *Singhaus v. Piper, supra,* it is held that a creditor stockholder is not entitled to recover under this penal provision because he is equally guilty with the other stockholders, citing cases. We are content to abide with that decision, and therefore hold that the inclusion of the debts to such stockholders in the judgment was erroneous.

3. Stockholders are only liable for debts contracted after default. It is not shown when the debts were incurred for which the claims were allowed. The credit for them all may have been extended before the time when the first notice should have been published, so far as the record shows. There is a failure of proof in this respect.

4. The Constitution, by section 4, art. XIb. merely declares the common-law liability of stockholders, and does not prohibit the legislature from imposing upon stockholders penal obligations for failure to comply with regulations affecting corporate duties prescribed by statute. There is nothing in the Constitution to prohibit such legislation. The cases of *Van Pelt v. Gardner,* 54 Neb. 701, and *Gorder v. Connor,* 56 Neb. 781, are not applicable. Some general expressions in these cases may, when read without reference to the facts and issues, seem to sustain the view that the liability imposed by section 577, Rev. St. 1913, violates section 4, *supra,* but, properly considered, the cases do not so decide. The judgment of the district court is reversed and cause remanded.

REVERSED.

SUSIE BIGBEAR WHITE, APPELLEE, V. FIRST NATIONAL BANK, DEFENDANT: JOHN P. LINCH ET AL., APPELLANTS.

FILED JANUARY 17, 1920. No. 20655.

1. **Appeal:** HARMLESS ERROR. "On appeal, an error or defect in the pleadings or proceedings, when not prejudicial to appellant, is not a ground of reversal." *Ward v. Holliday,* 87 Neb. 607.
2. **Fraud:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Brome & Ramsey and *W. T. Thompson,* for appellants.

Smith, Schall & Howell, contra.

DEAN, J.

Susie Bigbear White and her husband, Leo White, are Winnebago Indians residing on the reservation in Thurston county. She sued the First National Bank of Pender, H. D. Hancock, assistant cashier, E. G. Hancock and John P. Linch jointly in the district court for Douglas county to recover $14,316.95 obtained from her, as alleged, by the fraud and conspiracy of defendants in the purchase from her of a tract of land and in the sale to her of an undivided one-eighth interest in a concern that was represented as being actively and profitably engaged in the manufacture and sale of lightning rods. It was alleged that defendants conspired together to cheat and defraud her; that she relied on their false and fraudulent statements and representations, believing them to be true, and that she was thereby damaged in the amount of the sum sued for. Before the trial began the suit was dismissed as to the bank. The jury returned a verdict against John P. Linch and E. G. Hancock for $5,644.62 and for $5,983.24 against E. G. Hancock and H. D. Hancock. From a judgment rendered thereon the Hancocks and Linch appealed.

Linch answered separately, and alleged that the lightning rod property was worth all that plaintiff paid for it. He denied that he took any part in the purchase of the land or of having any interest therein. The Hancocks are brothers. They filed a joint answer denying generally the allegations of fraud. They denied participation in the sale of the lightning rod property and denied that Linch took any part in the purchase of the land.

The record is voluminous, and we cannot review all of it. We deem it sufficient to point out only a few of the prominent features that were developed at the trial. Substantially these facts appear: E. G. Hancock is a real estate agent and dealer in Indian and other lands. H. D. Hancock is assisant cashier of a bank at Pender and is related to Linch by marriage. When Susie made her investment Linch was engaged in an enterprise having to

do with placing lightning rods on the market. On May 29, 1915, E. G. Hancock obtained a 60-day option from Susie and her husband for the purchase of 160 acres of her land for $19,500. H. D. Hancock witnessed and took the acknowledgment of the grantors. Subsequently a sale contract, in form, was executed that named E. G. Hancock as second party. It was signed only by Susie and her husband. Hancock's name does not appear. It provided generally that a mortgage lien on the premises was to be paid by E. G. Hancock and the release of a certain life estate in the land, namely, that of Mrs. Armell, plaintiff's mother was to be obtained by him. This contract was witnessed by defendant H. D. Hancock. A deed was subsequently deposited in the bank by Susie and a receipt therefor was given to her by E. A. Wiltse, president of the bank. It may be noted that this deed was not finally delivered to Hancock, but to another, in which the name of Pearsall appears as grantee, to whom Hancock had already sold the land for $24,800. Susie testified that it was not her intention at any time to sell the land to E. G. Hancock, and that the contract and deed were signed to enable him to pay off the mortgage and buy in the life estate to the end that a loan might be obtained on her land. She testified that she did not consent to the sale "until he made us sell it to him." There is some confusion in her testimony on this point, but the jury doubtless concluded, and there is evidence to support it, that Hancock so controlled Susie and Leo that they were powerless in his hands, and at his will they did his bidding. During the time negotiations were pending E. G. Hancock professed a friendly solicitude for both, and from the evidence the jury would be justified in believing that he was apparently acting for them in a fiduciary capacity. Leo White was reluctant about signing the contract, but was finally persuaded to sign when E. G. Hancock handed him $20 for doing so. At the trial Susie wore a ring with a setting of brilliant hue but of trifling value. The ring, encased in a pretentious plush box, is in evidence. Susie

testified that Hancock presented it to her and explained that he did so because Leo had told him of complaints that she had made about him to the effect that he was not treating her right and that he had compelled her to pay too much interest. That H. D. Hancock was interested in the land transaction with his brother appears from his own and other testimony.

Respecting the sale of the interest in the lightning rod enterprise to Susie it appears that E. G. Hancock introduced Linch to Leo White in December, 1915, and told Leo in Linch's presence that Linch was "looking for a good man to work for him." Linch then offered Leo employment in the lightning rod plant at Omaha, and offered him $75 for the first month and $100 a month thereafter. Before Linch and Hancock left, Leo told Linch that he would accept the offer and begin work in February. In January following Leo received two letters from Linch, written at Omaha, wherein he referred to Mr. Hancock as having recommended him very highly; and that Leo's work would be "to stay here in the office. As far as work goes, you can do it all in two hours a day." He told Leo to bring his wife along, and to let him know by return mail the date of arrival and he would meet them at the train. The next day Linch wrote him again urging haste. On January 14 Leo began work, and shortly thereafter his wife came to Omaha, and within ten days $5,000 of her money was paid over to Linch by E. G. Hancock. The bill of sale from Linch to Susie Bigbear White was dated January 24, 1916, and recites as having been sold to Susie "the following goods and chattels, to wit: Undivided one-eighth interest in the American Lightning Rod Company, including everything pertaining thereto, except stock, and the stock to be paid for at the purchase price thereof." Without elaborate discussion we conclude that there is evidence from which the jury were justified in the belief that all of the property in which Susie bought an "undivided one-eighth interest" was worth considerably less than $1,000. Susie's account of

the final scene in the purchase of the lightning rod property follows: She testified that she and Leo and Linch left Omaha for Pender on January 24, 1916, the day of the settlement, and that the party went to E. G. Hancock's office. Upon arrival there Linch informed Hancock that Susie wanted to "buy in" on the lightning rod enterprise. She said that Linch asked Hancock if a settlement could not be made that day, to which Hancock replied that it could "if she wants to buy in down there, if she wants to invest her money in something that is worth while." She said that when Hancock displayed such ready willingness for settlement she requested him to give her money to her and let her settle with Linch, but that he refused, and Linch obtained her money from him. This did not close the lightning rod incident. Susie testified that soon afterwards Linch, but without success, tried to induce her to buy an undivided one-fourth part in his concern for $2,500. In about two weeks after Linch obtained Susie's money Leo was laid off without pay and he returned to his home on the reservation.

Defendants argue that there is a misjoinder of parties and of causes of action. Section 7713, Rev. St. 1913, provides: "The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." We do not think the substantial rights of the parties were prejudicially affected in the respects noted. The evidence amply supports the verdict against the respective parties as returned by the jury. Even though separate trials had been granted, we do not see how the result could have been different. *Ward v. Holliday*, 87 Neb. 607.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ELLIOTT LOWE.
EDWIN L. MALSBARY, APPELLEE, V. JOSEPH WHYTE ET AL., ADMINISTRATORS, APPELLANTS.

FILED JANUARY 17, 1920. No. 20663.

1. **Gaming.** A contract to operate in grain options to be adjusted according to differences in market value thereof, is a gambling operation, contrary to public policy and void.
2. **Contracts:** RIGHT OF RECOVERY. When plaintiff can maintain his cause of action without the aid of an illegal act or one that might be construed as *contra bonos mores* he will be allowed to recover.
3. **Gaming:** LIABILITY. A broker who receives money from his principal growing out of an illegal transaction is liable as agent for money had and received.
4. **Contracts:** LIABILITY. When an agent collects money for his principal upon an executed illegal transaction which is not pleaded in the petition and which is not necessary to plaintiff's right of recovery, the principal can recover it in an action for money had and received.
5. ———: UNLAWFUL CONTRACTS. When either or both parties as a matter of law are compelled to rely upon a transaction that is *contra bonos mores*, this court will refuse to aid either party.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

T. S. Allen and *Fawcett, Mockett & Walford*, for appellants.

B. F. Good, A. W. Richardson, A. M. Bunting and *Paul F. Good, contra.*

ALDRICH, J.

The plaintiff sues the administrators of the estate of Elliott Lowe to recover the sum of $214.94, alleged to be due on account of money had and received. Plaintiff's cause of action is based on the following instrument, which is in nature and form a due-bill in words and figures following: "Elliott Lowe & Co., 603 First National Bank Building, Grain Account, Lincoln, Nebraska. 6-1-16.

E. L. Malsbary: At the close of business today, your account on our Ledger is: Dr. $——; Cr. $214.94. Kindly advise us, at once, if this balance does not agree with your books. Should you desire an itemized statement, we will take pleasure in sending you one. Yours truly, Elliott Lowe & Co. E. & O. E." It is stipulated and agreed by and between the parties that, whatever judgment may be rendered in this case, the same shall be decisive of other similar claims held by plaintiff under assignments.

The defendant by way of defense pleads confession and avoidance, alleging that plaintiff's cause of action is based on speculation and ventures on margins in wheat and other grains, depending for profits or losses on fluctuations on the market on the board of trade, that no grain was actually bought or sold or intended to be bought or sold by either party, and that in the profits and losses on "the open board" the same are contrary to the statutes of the state of Nebraska, contrary to public policy, void and unenforceable. These transactions between plaintiff and Elliott Lowe, deceased, were speculations on the fluctuations in quotations on the board of trade. Defendants admit the death of Elliott Lowe, and defendants herein are administrators of his estate. The reply tendered to the issues of the answer is a general denial.

This case comes to this court on appeal from a judgment rendered in favor of plaintiff.

The issue tendered by plaintiff is one for money had and received. The defense offered is that of no liability on their part because the transaction is based on a contract *contra bonos mores*.

The record shows the plaintiff was able to sustain and did maintain his cause of action without aid or assistance of any transaction growing out of an illegal act or one that might be construed as contrary to public policy.

It may be admitted that a contract to operate in grain options to be adjusted according to differences in market value thereof is a gambling operation, contrary to public

policy. Lord Mansfield announced the true doctrine, which is followed by all courts, when he said: "No court will lend its aid to a man who founds his cause of action upon immoral or illegal contract." *Holman v. Johnson,* 1 Cowp. (Eng.) 341. This doctrine was announced by the Massachusetts supreme court in *Russell v. DeGrand,* 15 Mass. *35: "The rule of law is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain." That is the law of this state.

The true test is: Does the plaintiff, to sustain his claim, of necessity have recourse to an illegal act? If he cannot maintain his cause of action without so doing, this court as a matter of law will not assist him. The plaintiff's cause of action can be maintained at law as of and for money had and received; while defendants as a matter of law are compelled to rely upon a contract that is vitiated with the poison of immorality. To maintain his theory, we recognize the validity of his defense to set up a contract that is *contra bonos mores.* Then this court must leave him just where it found him.

The record shows that plaintiff turned over to Elliott Lowe, deceased, certain money to buy and sell grain on the Chicago board of trade, and defendants contend this was an illegal contract and nonenforceable. We answer, it is the law that an agent who undertakes to perform a contract which is contrary to public policy or in violation of law is under no obligation to perform it, but may violate it with impunity; but, if he collects money for his principal upon an executed illegal contract, the principal can recover it by an action for money had and received for his use as upon an express or implied promise by the agent to pay it. In the instant case the due-bill before referred to appears to make his promise an express one. *Floyd v. Patterson,* 72 Tex. 202, 13 Am. St. Rep. 787. The record discloses that the defendant is admittedly in the position of one who has broken the law. He alone alleges the corrupt contract and is the moving party

whose cause of action is based upon this immoral contract.

The record also shows that plaintiff and deceased, Elliott Lowe, stand in the relation of principal and agent. *Rogers & Bro. v. Marriott,* 59 Neb. 759. This being true, the agent is liable for money had and received from his principal.

In *Planters Bank v. Union Bank,* 83 U. S. 483, it was held that an illegal contract will not be executed, yet, where it has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise expressed or implied.

We may say the position assumed in this case by plaintiff has the approval of law and is not tainted or dependent upon any contract that is contrary to good morals and good conscience. When an agent collects money for his principal upon an executed illegal transaction which is not pleaded in his petition, and which is not necessary to his right of recovery, the principal may recover it in an action for money had and received.

This leads us to assume that as a matter of law, when an agent has received money growing out of an illegal contract, he may be compelled to pay it at the suit of his principal. This is so because the law implies a promise on the part of the agent to pay to his principal money received by him as such agent, and illegality of contract by virtue of which money was collected affords no defense. Having fully passed, it can make no difference to future morals and in no way affect public policy as to what was the real basis of the money had and received from the principal by the agent, Elliott Lowe, in his lifetime.

Further consideration of these propositions leads us to assert that the theory of plaintiff's claim is based on *Rudolf v. Winters,* 7 Neb. 125. We are unable to see wherein there is a conflict with the adjudicated cases cited

by defendants, which are based upon a different rule than the cases cited by plaintiff. It appears to be held by the great weight of authority that, when either party or both parties are obliged to invoke the aid of a contract which is contrary to good morals and against public policy to obtain relief, courts will not respond. The plaintiff in the instant case having maintained his cause of action without requiring assistance from a gambling or illegal contract, then he is entitled to a judgment against defendants as for money had and received.

We conclude that plaintiff comes within the rules laid down in *Rudolf v. Winters, supra,* and hold that the judgment for plaintiff must be affirmed.

AFFIRMED.

IN RE ESTATE OF WILLIAM GLOVER.

CHARLES R. GLOVER, APPELLEE, V. ELIZABETH A. GLOVER, APPELLANT.

FILED JANUARY 17, 1920. No. 20787.

1. **Administrators: APPOINTMENT.** A petition stating the jurisdictional requirements, filed by a qualified person in the county court for the appointment of an administrator of the estate of a deceased person, confers upon the county court jurisdiction to make such an appointment, notwithstanding the petitioner may file a dismissal of his petition before any action is taken thereon.
2. ———: **PETITION: ACTION.** The filing of a petition in the county court for the appointment of an administrator of the estate of a deceased person is not an "action" as contemplated in section 7654, Rev. St. 1913.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Hainer, Craft & Edgerton, for appellant.

Smith & Hare and *Charles L. Whitney, contra.*

TIBBETS, C.

An appeal from an order of the district court for Hamilton county, Nebraska, confirming the order of the county court of said county, appointing an administrator of the estate of William Glover, deceased.

The facts in this case are deducible entirely from the transcript from the county court of Hamilton county.

William Glover died intestate on May 23, 1913, leaving surviving him, his widow, Elizabeth A. Glover, and several children.

On the 21st day of June, 1913, Elizabeth A. Glover, the appellant and widow, caused to be filed a petition in the county court of Hamilton county, asking for her appointment as administratrix of the estate of the deceased. After the filing of the petition, the record discloses that the preliminary steps for her appointment were taken by the county judge, and an order for publication to show cause was made. All papers were taken by the attorney for Mrs. Glover from the office of the county court, since which time nothing has been seen or heard of them, and she made no further effort toward perfecting her appointment.

On the 21st day of May, 1915, Bartley & Sons, creditors, filed their petition in the county court, asking for the appointment of an administrator of the estate of the deceased.

It is further shown by the record that on the 8th day of June, 1915, there was filed in the county court a request by Bartley & Sons to dismiss their petition, for the reason that the claim and account of Bartley & Sons had been settled, paid and discharged.

On the 9th day of June, 1915, there was filed in the office of the county judge an affidavit signed by Charles R. Glover, who stated he was a brother of William Glover, deceased; that he had an unpaid claim against the estate of William Glover; and that, when the administratrix then petitioned for was duly appointed and qualified, he would file his claim; and, if for any cause the administra-

trix now petitioned for did not qualify or refused to serve in such capacity, then he asked that he be permitted to name one who would qualify.

On the 10th day of June, 1915, an order was issued by the judge upon the said application of Bartley & Sons and Charles R. Glover. Mrs. Elizabeth A. Glover, by her attorneys, appeared specially in the county court for the purpose of challenging the jurisdiction of the same, and moved to quash the service of the alleged application for appointment of administrator, for the reason that the service by publication showed on its face that it was insufficient to give the court jurisdiction.

On the 29th day of March, 1916, the court, upon the application of Charles R. Glover, appointed Frank E. Quinn administrator of the estate.

There is no question of fact involved in this case. It is a pure question of law. The statute governing is contained in section 1390, Rev. St. 1913, which reads as follows:

"Every person having a claim or demand against the estate of a deceased person whether due or to become due, whether absolute or contingent, who shall not after the giving notice as required in this chapter exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same in any action whatever: Provided, if any person having such claim or demand shall fail for two years from and after the death of such decedent to apply for or take out letters of administration on the estate of such deceased person, or cause such letters to be taken out as provided for in this chapter, then such claim or demand shall likewise be forever barred; this section shall not be construed to limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor shall it be construed to affect actions pending against the deceased at the time of his death."

If Bartley & Sons had not dismissed their petition, but instead had proceeded in the regular and statutory manner, there could have been no question but that the duty of the county court would have been to appoint an administrator; but appellant is relying upon the fact that Bartley & Sons had filed a dismissal of their petition before any action had been taken thereon. This is true, but had it been dismissed? No action, as shown by the record, was taken by the county court. He made no order of dismissal, but, on the contrary, treated the petition as an active and operating agent toward the accomplishment of the appointment. An order was issued and citation had on this instrument. Afterwards another notice was published in which Charles R. Glover was designated as the petitioner, and on which the administrator was finally appointed. Counsel for appellant now claim that the affidavit and request of Charles R. Glover constituted the petition on which the administrator was appointed. If this were true, counsel's contention should be sustained, as the affidavit and request did not in any way comply with the statutes, and, furthermore, were filed too late to be available. This we do not understand to be the case, however, as reference to the record will show that in the notice first published both Bartley & Sons and Charles R. Glover were mentioned as petitioners; the obvious intent being that all proceedings were conducted with direct reference to the petition filed by Bartley & Sons.

If we are correct in our conclusions, then the only question to be determined is: Was the petition of Bartley & Sons automatically dismissed by their filing a request for dismissal? We have found no case decided in this state, or elsewhere, that bears directly upon this point under a statute similar to ours. In the case of *First Nat. Bank v. Bradshaw,* 91 Neb. 714, Judge Sedgwick, in construing section 1390, Rev. St. 1913, at p. 716, says: "The application by creditors must be made within two years, but they may make the application directly, or 'cause such

letters to be taken out as provided for in this chapter.' If the creditors make no such application within the two years allowed them for that purpose, they cannot afterwards institute such proceedings. If letters are taken out as provided for in the act, and the estate is administered upon accordingly, it is not necessary that there should be affirmative proof that the creditors caused it to be done; it will be presumed that it was in behalf of all persons interested in the estate. The technical construction contended for would bar claims of creditors when letters of administration were taken out by the widow or next of kin either before or after the expiration of the two-year limitation, and in all cases, unless such letters were taken out by the creditors in person or through their procurement; this could not be the intention of the legislature."

If the appellant's construction of the statute be correct, it opens up a fruitful field for fraud. An interested party could make an application for letters, delay it as long as possible, and, when the patience and trust of the creditors were exhausted, induce a creditor to file an application or petition, and, after another delay and after the two-year period had expired, dismiss his petition, and by reason thereof the other creditors are forever barred, and the estate profits thereby to the extent of the unpaid claims. When a creditor files his petition under said section, he not only files it for himself, but for all the other creditors, as decided in the case of *First Nat. Bank v. Bradshaw, supra.* The law does not contemplate that a person, to preserve his rights, should do a useless thing. The filing, within the required time, by one creditor is a protection to the others. If appellant's contention be correct, then, if there were a hundred creditors, it would be necessary for each to file a petition, and, if so, separate notices, orders, publications, etc., would be necessary. It would be equally unreasonable to suppose that, after a creditor had filed his petition and caused other creditors to rely on the extension of time created by

reason thereof for the filing of claims, he could, without their knowledge or consent, deprive them of such rights as they might be entitled to under the petition to the same extent as though there had been no dismissal. The filing of the petition by Bartley & Sons created a right in the creditors which, by withdrawal, they were unable to deprive them of. The act under consideration is one of limitation. It curtails and limits the general statutes on that subject. A person may have a claim against a party in which the limitation for its collection under the general statutes is five years, yet, if the party dies, he must proceed to its collection in the manner and time provided in this act. It is a special limitation, and in contravention of the general act, and should therefore have put on its construction no strained and unusual meaning. For its construction resort may be had to the intention of the legislature and the object to be secured. From a careful analysis of the act there can be no question but that the evident intention of the legislature was to give claimants ample opportunity to collect their debts against estates of persons deceased, the same to be done, however, in as speedy and effective a manner as possible, in order that the estate might be settled and the assets distributed to those entitled to the same in the shortest possible time. But there was no intention that *bona fide* creditors should be prevented in presenting their claims and having them passed upon by the proper parties by the interposition of technical and strained constructions, and especially by those whose duty it was to see that an administration of the estate should be had. Appellant's duty, as we understand it, was to administer the estate as speedily as possible. She had a priority to the appointment as administratrix. A petition was filed in her behalf asking for her appointment. From there her activities, as far as the procurement of an administrator was concerned, ceased. She never fulfilled the statutory requirements for her appointment, and threw every obstruction possible in the way of any one else being appointed, and she is now in this court still objecting to the appointment of

an administrator. She makes no complaint against the one selected by the court; she refused it herself; and she makes no suggestion as to the proper person for the position. Her position is not based upon any equitable grounds, and her rights, if she has any, must be based on a literal construction of this act. The act not only does not afford her any relief, but a construction thereof, based upon the evident intent of the legislature, is against her contention. "In construing a statute, the strict letter of the law ought not to be followed when such an interpretation would lead to an unreasonable or absurd conclusion." *Parket v. Nothomb,* 65 Neb. 315.

Counsel for appellant treat the petition on which the administrator was appointed as that of Charles R. Glover, and base their argument and citations of authorities on that supposition, but the record does not sustain their position. The administrator was appointed on the application of Bartley & Sons. They, by attempting to dismiss their petition, cease to become active participants, but the petition "would be presumed filed for the benefit of all persons interested."

We are aware that sections 7654, 7655, Rev. St. 1913, make provisions in which a plaintiff may dismiss an action. This is in no sense an action. It is a petition or application directed to the court to put in operation the functions of that office, which it is his duty to do, if the petition states the jurisdictional requirements.

Section 1303, Rev. St. 1913, provides: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it." There are certain duties which the statutes make incumbent on the county court, and among those are that, when his attention is directed to it and he has jurisdiction over the subject-matter, he should see that a will is proved or an estate administered. In order for him to ascertain if he has jurisdiction to appoint the administrator, reference must be had to the petition filed, and there is no way proceedings can be stayed except for want of juris-

diction. Again, administration is necessary to ascertain if the estate is subject to an inheritance tax. To determine the tax to be assessed, it is necessary to probate the estate of a deceased person, in order to ascertain what proportion is subject to such tax. The petition of Bartley & Sons contained all the jurisdictional grounds. The court obtained jurisdiction over the subject-matter. The dismissal of Bartley & Sons could not oust the county court of such jurisdiction.

Section 7654, Rev. St. 1913, contemplates an action. The filing of a petition or application for administration is not an action as contemplated in said section. No complaint is made; no relief is asked. It shows to the court that it has jurisdiction, and requests it to put in operation the powers and duties required of it by the statutes. The instant the petition is filed the further operation or control of the matter passes out of the hands of the petitioner and into the hands of the court.

Our conclusion is that the real intent of the statutes is that any creditor or person interested therein could proceed with the petition filed by Bartley & Sons. This was done by Charles R. Glover, who sets out that he is a creditor, and proceeds to have the petition acted upon and an administrator appointed. Furthermore, as already stated, this petition never was dismissed, as appears by the records of the county court.

Considering the view of this case which we have taken, and differing with counsel for appellant as we do on the basic principle underlying this cause, their citations of authorities and argument, as contained in their brief, are not applicable.

For the reasons heretofore set forth, we recommend that the finding and judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

STATE, EX REL. CITY OF SEWARD, APPELLEE, V. GEORGE W. MARSH, AUDITOR OF PUBLIC ACCOUNTS, APPELLANT.

FILED JANUARY 31, 1920. No. 21302.

1. **Municipal Corporations: BONDS: ISSUANCE.** As a general rule, municipal bonds must be issued in conformity with the statutes in force at the time of issuance.
2. **———: ———: VALIDITY.** Where a municipality in good faith enters into a valid contract for the sale of municipal bonds voted in strict conformity with the statute then in force, but not yet issued, their validity is not affected by a subsequent statute changing the terms of municipal bonds.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Clarence A. Davis, Attorney General, and *George W. Ayres,* for appellant.

Thomas, Vail & Stoner and *R. R. Schick, contra.*

ROSE, J.

The city of Seward, relator, applied to the court below for a peremptory writ of mandamus to compel the auditor of public accounts, respondent, to register municipal bonds of relator in the sum of $85,000. Respondent resisted the allowance of the writ on the ground that the bonds, if issued, would not comply with the terms of the present statute. Relator insists that the bonds were voted and sold according to the requirements of the law then in force, and that the present statute, though providing for different obligations and repealing the act under which relator proceeded, did not destroy the vested rights created by the contract of sale, nor impair the obligations of the purchase. The trial court allowed the writ, and respondent has appealed.

The question is: Should respondent be required to register the bonds? They were voted May 20, 1919, and were made payable in 40 years, with a provision for

optional payment in 10 years, in strict comformity with an act which went into effect April 7, 1919. Laws 1919, ch. 48. The Lincoln Trust Company entered into a contract with relator June 3, 1919, to buy the bonds at a premium of $1,680. By an act which went into effect in July, 1919, the legislature repealed the statute under which the bonds were voted and shortened the term for the payment of municipal bonds of relator to 20 years with optional payment after 5 years. Laws 1919, ch. 46. Though the bonds are dated June 1, 1919, they were not printed, presented for registration, or issued until after the statute had been changed in the respects mentioned.

It is a general principle of law that municipal bonds must be issued in conformity with the statute in force at the time of issuance. *Morgan v. Falls City,* 103 Neb. 795. This doctrine, however, cannot be effectively invoked to destroy vested rights or to impair the obligations of contracts. Relator duly exercised its power to vote bonds authorized by law. When the terms of the bonds voted were legal and when the statute authorizing the issue was in force, relator agreed to sell, and the Lincoln Trust Company to buy, the bonds. Authority to make the contract was perfect. The parties acted in good faith. Though the purchaser has not yet paid the purchase price, the mutual promises are legal and binding considerations. In addition to a premium the purchaser agreed to print the bonds. These advantages may be lost, and relator will be compelled to bear the expenses of a second election and a new bond issue, if the sale is defeated. On the faith of the bonds voted and on the integrity of the contract of sale, relator incurred an immense indebtedness for public improvements in a municipal emergency. Both buyer and seller are insisting on performance, if the bonds can be legally issued. By making the validity of the bonds a condition of complete performance, the parties did not lose any constitutional right created by the legal contract in fact made. The

change in legislation came too late to invalidate the bonds. The buyer and the seller are entitled to the fruits of their bargains. In this view of the law and the facts, the bonds should be registered as valid obligations of relator.

AFFIRMED.

LETTON, J., not sitting.

JOSEPH W. FAGAN v. STATE OF NEBRASKA.

FILED JANUARY 31, 1920. No. 21067.

Criminal Law: EVIDENCE: REVIEW. "Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence." *Johnson v. State*, 88 Neb. 328.

ERROR to the district court for Fillmore county: RALPH D. BROWN, JUDGE. *Reversed.*

John K. Waring, Robert B. Waring and *H. G. Wellensiek*, for plaintiff in error.

Clarence A. Davis, Attorney General, and *Cecil F. Laverty, contra.*

CORNISH, J.

The defendant, Joseph W. Fagan (plaintiff in error), convicted of attempting to procure abortion, appeals.

The defendant contends, first of all, that the evidence is insufficient to sustain the verdict. Upon consideration of the evidence, we are of opinion that this objection to the verdict should be sustained.

Mrs. Saul (previously Grace Moore), upon whom the attempted abortion was made, if at all, was at the time an inmate of the Girls Industrial School. The defendant, a married man, was instructor of music and bandmaster at the same institution. She testified that, as a result

of intercourse had with the defendant, she became pregnant; that afterwards he procured and gave her certain drugs for the purpose of enabling her to accomplish an abortion; that the drugs, although taken by her, did not result in an abortion. The child was born some seven months later.

The evidence of Mrs. Saul is uncorroborated, except that her testimony that the matron of the school observed that she did not look well at about the time that she took the drugs, and advised her to report to Doctor Bixby, is followed by the doctor's testimony that she did report to him; that the matron told him that Mrs. Saul and others were complaining, and asked that he prescribe for Mrs. Saul. He did not testify that he found her ill.

Impeaching evidence shows that her reputation for truth and veracity was not very good. Her testimony is contradicted in many particulars. She told two witnesses that she received the drugs from one Jack Williams, of Lamar, Colorado. She at first wrote a note, stating that no person at the school was responsible for her condition, and she told Doctor Bixby that she had gotten into trouble at Lincoln. Doctor Bixby, whom she visited, found no evidence of any effect of the drug upon her. The evidence indicated, not only that the drugs taken by her were harmless, but the doctor's testimony is that the drugs could not have produced an abortion. After four months' pregnancy, she married her present husband, who was also employed at the school. She swears at one time that she asked the defendant to get the drug; at another, that he got it on his own motion. She admits that she was jealous of him because of his paying attention to another woman. Her testimony as to time and place of intercourse is met with strong rebuttal testimony.

On the other hand, the defendant, on the witness-stand, denied ever having any improper or illicit relation with her. Aside from her testimony, there is no evidence in the record that defendant ever kept company

with her or sought or had opportunities for the two months' illicit relations sworn to.

No doubt, if defendant induced Mrs. Saul to take the drugs, believing that they would produce abortion, that would be sufficient, but she nowhere quotes defendant as saying that the drug handed her would do so. When the drug itself would be ineffectual for abortion, this circumstance has some significance.

We are of opinion that the evidence before us is not such as to justify the jury in finding beyond a reasonable doubt that the accused made the attempt charged against him.

REVERSED AND REMANDED.

LETTON, J., not sitting.

ROSE, J., dissenting.

My review of the record convinces me that the evidence establishes the guilt of defendant beyond a reasonable doubt and that there is no error in the record prejudicial to defendant. I, therefore, dissent from the opinion of the majority.

WITIE FRIED, APPELLEE, V. ZALMON M. ELLIS, APPELLANT.

FILED JANUARY 31, 1920. No. 20654.

Appeal: INSTRUCTION: HARMLESS ERROR. Where under the evidence it appears that appellant was not injured by an erroneous instruction, the giving of such instruction is error without prejudice.

APPEAL from the district court for Douglas county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

W. W. Slabaugh and *Lloyd A. Magney,* for appellant.

Ringer, Bednar & King, contra.

DEAN, J.

The plaintiff, Mrs. Fried, conducts a grocery store at Omaha. She was arrested and fined $10 in justice court

for a violation of the pure food law. She did not pay the fine at the time it was imposed, but was permitted to return to her place of business. Subsequently, upon her neglect and refusal to pay, the court issued a *mittimus* under which she was arrested by defendant, as constable, and given into the custody of the jailer. This action was brought by Mrs. Fried to recover $5,000 damages for injuries sustained by her, as alleged, that resulted from the use of unreasonable and excessive force by defendant in making the arrest. She recovered a verdict and judgment for $750, and defendant appealed.

Defendant complains because the court instructed the jury that plaintiff would be entitled to recover such damages as were the proximate result of the force employed by defendant, unless the defendant satisfied the jury "by a preponderance of the evidence that he used no more force against plaintiff than was reasonably necessary to enable him to take her into custody and to remove her to the county jail." We do not think the instruction was prejudicially erroneous in view of the jury's special finding that the defendant did "use greater force than was reasonably necessary, under the circumstances disclosed by the evidence, to enable him to take plaintiff into custody and remove her to the county jail." The rule is that, where a special finding by a jury shows that a party was not injured by an erroneous instruction, the giving of such instruction is not prejudicial error. 38 Cyc. 1815. We conclude that defendant's argument cannot be upheld.

Instruction numbered 3 is assailed by defendant. He says: "This instruction does not limit plaintiff's recovery to those damages which she sustained by reason of the excessive force, if any, used by the defendant, but makes it the duty of the jury to impose upon defendant the responsibility for all of her damages, even though it be apparent from the evidence that only a very small part of them were due to the excessive force, and a much larger part to her own frantic resistance, for which the

officer should not be held and is not legally responsible." Defendant did not request an instruction containing the limitation that he now invokes. The instruction as a whole limits the plaintiff to compensation for actual damages only and to such sum as will fully and fairly, but not excessively, compensate her therefor. In view of the jury's special finding that is herein noted, the presumption is that the verdict was based on damages sustained as a result of the use of unreasonable and excessive force. The special finding of the jury is abundantly supported by the evidence. The instruction complained of on burden of proof was not prejudicial in this case. We do not find prejudicial error.

The judgment is therefore

AFFIRMED.

BOWMAN-KRANZ LUMBER COMPANY, APPELLEE, V. BENJAMIN F. BUSH, RECEIVER, APPELLANT.*

FILED JANUARY 31, 1920. No. 20690.

Carriers: NEGLIGENCE: DAMAGES. The provision in the uniform bill of lading in respect of an interstate shipment that the amount of loss or damage for which the carrier shall be liable in case of loss shall be computed as of the value represented by the *bona fide* invoice price, if any, at the place and time of shipment, including the freight charges if prepaid, is not a limitation of the carrier's liability for negligence.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed on condition.*

J. A. C. Kennedy and *Philip Horan*, for appellant.

Leslie H. Kranz and *D. H. Sheehan, contra.*

DEAN, J.

Plaintiff recovered a judgment for $162.94 for the conversion of a car of coal purchased at Paris, Arkansas, and consigned to Omaha, Nebraska, where upon ar-

*March 13, 1920, no remittitur having been filed, the case was reversed and remanded.

rival, the shipment was inadvertently delivered by defendant to a company other than the consignee. The district court held that the value at destination should determine the measure of damages and judgment was rendered accordingly. The defendant appealed.

The case is submitted on an agreed statement of facts. The sole question to be determined is whether the value at the place of shipment or at the place of destination should govern in computation of damages. We conclude that under the facts here presented and the authorities the former should govern.

Defendant relies upon the uniform bill of lading to sustain its contention, which among other provisions, contains this: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

Plaintiff argues that the provision in question is an attempt to limit the liability of the carrier for negligence, and that it is therefore void under the Cummins amendment to the interstate commerce act. 8 U. S. Comp. St. 1916, sec. 8604*a*. The recent decisions seem to hold otherwise. This provision has been construed and held by the interestate commerce commission and by the federal and state courts to be a reasonable rule by which to determine the value of a shipment in case of loss, and that it is not a limitation of the carrier's liability for negligence. *Shaffer & Co. v. Chicago, R. I. & P. R. Co.*, 21 I. C. C. 8; *Springfield Light, Heat & Power Co. v. Norfolk & W. R. Co.*, 260 Fed. 254; *Wallingford v. Atchison,*

T. & S. F. R. Co., 101 Kan. 544, L. R. A. 1918B, 716. Under the Cummins amendment it has been upheld. *In re Cummins Amendment*, 33 I. C. C. 682, at p. 693. Some of the authorities point out that the rule is salutary, in that the invoice value of the shipment, with freight added where it has been prepaid, can be readily ascertained, and that prompt settlement can be made by the parties without resort to tedious and expensive litigation.

At the trial it was agreed that the value at the point of shipment was $90.90, which with accrued interest to the date of filing the answer was $95.41, when defendant offered to confess judgment for that amount. The judgment is therefore affirmed, upon condition that plaintiff within ten days remit all in excess of $90.90, with interest at 7 per cent. from date of shipment to date of offer to confess judgment. The costs in district court and in this court subsequent to the offer to confess judgment are to be paid by plaintiff.

AFFIRMED ON CONDITION.

JAMES D. RAITT ET AL., APPELLANTS, V. FRANK D. COLSON ET AL., APPELLEES.

FILED JANUARY 31, 1920. No. 20692.

New Trial: COLLUSION. If in a cause of action attorneys enter into a secret agreement with one of defendants to hold him harmless, in consideration of his assistance to plaintiff, and such arrangement in any way affects the verdict, a new trial will be granted. But in the present case the agreement was not performed and a fair trial was had.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. M. Cain and *J. C. Cook*, for appellants.

Sutton, McKenzie, Cox & Harris, Brome & Ramsey, C. O. Stauffer and *J. A. Singhaus, contra.*

ALDRICH, J.

Frank D. Colson sued James D. Raitt, Gilbert A. Palmer, and Robert A. Evans in an action at law for defrauding him of a large sum of money. The district court for Douglas county rendered judgment against the three defendants in his favor for $9,841.87. Raitt and Palmer brought this suit in equity to have that judgment set aside or new trial granted and now appeal from the decree refusing to grant relief prayed for.

The appellants contend that Colson's judgment was fraudulently obtained; that the alleged cause of action upon which it rests was released by the judgment creditor's releasing one of three joint defendants; that the appellees entered into a fraudulent conspiracy to prevent a fair trial. They claim an attorney for Evans and an attorney for Colson entered into a written agreement whereby Evans was to be released from any judgment that might be obtained against him and he was to furnish information to aid Colson; that all the appellees, defendants in this suit, knew of the collusive arrangement; that the agreement was carried out and Colson obtained a judgment for $9,841.87, which should be set aside; that the appellants did not know or learn of this agreement until several months after the case was tried.

It is admitted by appellees that the attorney for Evans and the attorney for Colson entered into, signed and delivered an agreement to release Evans from any judgment obtained against him. The record discloses that the contract was revoked and disregarded and a fair trial had; that only these two attorneys and one attorney for defendants in this case ever knew of the agreement, and that Evans did not know of it.

The contract was dictated by one of the attorneys and written with a typewriter by the other. There were two copies and each took one. The agreement was called off by telephone by the parties to it and was in no way executed. The parties went to trial, wholly disregarding the contract. Only Evans' attorney, Colson's attorney

and one other attorney knew. Evans was represented in the trial by his attorney, a party to said agreement. The appellants later learned of the secret agreement between the attorneys. The parties to the contract refused to comply with appellants' demands and the order of the court for production of the contract, consequently the affidavit of an attorney for appellants became the evidence as to its substance, in accordance with section 7960, Rev. St. 1913.

The secret agreement in substance was as follows: Frank D. Colson promised to hold Robert A. Evans harmless and indemnified from any and all liability on account of the certain cause of action in the suit last referred to and from any judgment that might be rendered therein, in consideration of Robert A. Evans continuing to appear as a *bona fide* defendant resisting the action of Frank D. Colson and at the same time aiding the plaintiff Colson to obtain judgment against himself and his codefendants in said action and in every way aiding the plaintiff in a recovery in this suit; that, in consideration of such aid and information to the plaintiff, Robert A. Evans should be released and discharged from all liability on account of this cause of action and judgment.

The agreement was revoked almost as soon as made and only three people knew of its existence. No one was harmed: Nothing was done by reason of it.

The judgment is therefore

AFFIRMED.

RAY SANDLOVICH ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 31, 1920. No. 20733.

1. **Criminal Law: STATUTE: TITLE: CONSTITUTIONALITY.** The title of the act relating to the larceny of motor vehicles and requiring garages to keep records of motor vehicles is broad enough to include

the crime of buying or receiving stolen automobiles, and is consistent with the constitutional provision confining an act to one subject. Laws 1917, ch. 201.

2. **Information**: SUFFICIENCY. An information charging an offense in the language of the statute is sufficient.

3. **Criminal Law**: PLEA OF GUILTY: WITHDRAWAL AFTER SENTENCE. After sentence, courts may, in their discretion, permit pleas of guilty to be withdrawn, or refuse to allow such withdrawal, and, except where there has been an abuse of such discretion, the supreme court will not interfere.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Reese & Stout, for plaintiffs in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra.*

ALDRICH, J.

Defendants were convicted under section 3, ch. 201, Laws 1917, of buying stolen property. Both defendants prosecute error.

Three assignments of error are relied upon for reversal: First, that the act under which the prosecution is brought is unconstitutional for the reason that the act contains more than one subject, and the same is not clearly expressed in its title; second, the information does not sufficiently describe the ownership of the property alleged to have been bought, and that the information does not state facts sufficient to constitute a crime; third, the defendants were coerced and misled by fraud and misrepresentations into entering pleas of guilty.

The title of the act in question is as follows: "An act relating to the larceny of motor vehicles and the altering or defacing of the numbers of motor vehicles, providing for the keeping of records by garage of motor vehicles, and providing penalties for the violation of this act." It is urged that the title is not sufficiently broad to include a conviction for receiving stolen motor vehicles. Section 11, art. III of the Constitution, pro-

vides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

We do not think the act is open to the objection made by defendants. It was the object of the legislature to protect the public from larceny traffic in automobiles, and the title to the act is sufficient. It is well known that he who is guilty of larceny in motor vehicles, for commercial purposes, can successfully maintain his machinations only in connection with a "fence," that is, a place for keeping stolen goods for purposes of affording a market for the same. Then it is plain that both the thief, who takes and carries away the vehicle in the first instance, and the man who receives it to place it on the market are in a conspiracy to aid and abet, and to successfully carry out the original crime of stealing motor vehicles.

The object and purpose of the statute is to break up the criminal industry of stealing automobiles and affording a market for these stolen goods. This industry in crime is so intimately interwoven with the stealing of automobiles that one is indispensable to the other.

It is obvious, in creating a market for stolen automobiles, the person so engaged may be an accessory either before or after the fact. In either event the body of the act is clearly expressed and is germane to its object and purpose. The title, while not a precise epitome of the body of the act, yet is sufficiently plain and broad to accomplish the object of the legislature, and is a plenary compliance with section 11, art. III of the Constitution. *State v. Ure,* 91 Neb. 31; *Alperson v. Whalen,* 74 Neb. 680.

We conclude this phase of the discussion by claiming that title to a legislative act, enacted for the purpose of preventing and punishing the commission of certain crimes, is broad enough in its language to embody the acts necessary to the carrying out or causing the perpetration of the crime which the statute was created to prevent.

Defendants urge that the information does not sufficiently describe the ownership of the property alleged to have been bought, and that it does not state facts sufficient to constitute a crime. This court has held that, "where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." *Goff v. State,* 89 Neb. 287; *Cordson v. State,* 77 Neb. 416. The information in the instant case following the language of the statute is sufficient and is not open to the objection that ownership is not alleged. It specifically informs defendants of what crime they were alleged to have committed, and avers facts precisely informing them of what they were charged. They were cognizant of these matters and had an opportunity to meet them, but, instead, pleaded guilty.

The state must prove beyond a reasonable doubt that the property was stolen. Then, if that is true, a failure to allege ownership will not make the information bad in charging the receiving of stolen property under this statute. It is only necessary that the information describe the transaction with sufficient accuracy so that a judgment of conviction or acquittal would constitute a bar to a subsequent prosecution for the same offense. It seems that the information based upon this statute amply describes the crime and the property bought with sufficient certainty to enable any court to identify it. It is obvious that the crime with which defendants are charged is plainly defined in the statute creating the offense; that is, the statute itself sets out all the essential elements of the crime of buying or receiving stolen property with intent to defraud another. We hold an information meeting this requirement is sufficient.

These propositions are ably discussed in *State v. Martin,* 94 Wash. 313, which opinion was based upon the Code of the state of Washington. We hold it to be the rule of this court that an information which charges the crime, substantially in the language of the statute, and states the

acts constituting the offense in ordinary, concise language so that a person of average intelligence may know what is intended, is sufficient. Whenever an information is measured by such a standard, it meets the full requirements of justice and the welfare of society, and does not tend to defeat the substantial rights of defendants.

The defendants also contend that the trial judge erred when he refused to allow them to withdraw their plea of guilty. We do not believe there was any abuse of discretion by the court in this respect. *Waller v. United States,* 179 Fed. 810, 31 L. R. A. n. s. 113. The motion to allow defendants to withdraw their plea of guilty was not made until after sentence was passed. This motion should not be sustained under the circumstances after judgment had been taken, unless defendants produced sufficient showing. Defendants should not be allowed to gamble with the judgment of the court and then object because the sentence is more than they anticipated.

The judgment and sentence should be affirmed.

AFFIRMED.

LETTON, J., not sitting.

BANKERS SURETY COMPANY, APPELLANT, V. WILLOW SPRINGS BEVERAGE COMPANY, APPELLEE.

FILED JANUARY 31, 1920. No. 20843.

1. **Intoxicating Liquors:** LICENSE: PUBLIC POLICY. Under our law, and even prior to the passage of the 1907 statute (Rev. St. 1913, sec. 3888), it being unlawful to issue a license for the sale of intoxicating liquors at retail to any person other than the real party in interest, as such a license was considered a personal trust to the licensee, a contract between the licensee and a third person, making such third person an undisclosed principal for the operation of the business, is against public policy.
2. **Principal and Agent:** UNDISCLOSED PRINCIPAL: LIABILITY. An undisclosed principal is bound by simple contracts made by his agent when the acts done by the agent are within the scope of his authority and in the course of his employment.

3. ———: ———: BONDS. Where one acts as an undisclosed principal of a saloon-keeper and thus unlawfully controls and operates a saloon in the name of such saloon-keeper, as licensee, and a third person furnishes to the saloon-keeper a liquor license bond, necessary to the carrying on of such business, such third party, when he learns the facts, is not denied the right of holding the undisclosed principal on the bond contract, though the arrangement between the undisclosed principal and his agent is against public policy, when the party furnishing the bond did not know of, and did not purposely nor wittingly intend to aid, nor further, such unlawful arrangement, and was not, therefore, in *pari delicto* with the other parties.

4. **Limitation of Actions:** INDEMNITY BOND. It is the rule in the case of indemnity contracts that a cause of action to recover indemnity does not accrue until a loss occurs, and, it follows, the statute of limitations does not commence to run until that time.

5. ———: FRAUD. If a person against whom a cause of action exists, by fraud or concealment, prevents the person having such cause of action from obtaining knowledge thereof, the statute of limitations will not commence to run until the cause of action is, or by due diligence should have been, discovered.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Brogan, Ellick & Raymond, for appellant.

I. J. Dunn, contra.

FLANSBURG, C.

This was an action against defendant, Willow Springs Beverage Company, as undisclosed principal of a saloon-keeper in Nebraska City, upon a contract made by the saloon-keeper, in favor of the plaintiff, Bankers Surety Company.

A demurrer to the petition was sustained and the action dismissed, from which ruling the plaintiff appeals.

The petition sets out that in 1907 one Prenica, a licensed saloon-keeper in Nebraska City, made application to the plaintiff, Bankers Surety Company, for a liquor license bond; that this was furnished him by the plaintiff company, and by the terms of this bond plaintiff agreed to pay all damages, fines, and penalties adjudged against Prenica growing out of the operation of the saloon and

the sale of intoxicating liquors. As a condition to the issuance of said bond, however, the petition shows that Prenica made written agreement to indemnify the plaintiff company against all loss or expense incurred by it under said bond, and represented in his application that the stock and fixtures owned by him were of the value of $4,200. The petition further alleges that the defendant, during the year 1907, was a corporation engaged in the manufacture of intoxicating liquors, and that this defendant was the owner of said saloon and operated it secretly through Prenica as its agent and employee, and that Prenica had no other interest than that of an employee; that plaintiff was not informed of these facts of ownership and control of the saloon until June 15, 1916, and in its dealing relied upon Prenica being the sole owner and proprietor; that plaintiff has been compelled to pay $2,740 under the bond furnished, has not been reimbursed, and seeks judgment against defendant as an undisclosed principal upon the contract given by Prenica in his name as licensee, agreeing to indemnify the plaintiff company.

The defendant contends that the petition does not state a cause of action, since the relationship of principal and agent alleged to exist between Prenica and the defendant is, on its face, against public policy and void, and that to allow the plaintiff to recover gives recognition to, and enforces, this illegal contract of agency.

1. Our statute (Rev. St. 1913, sec. 3888) making it unlawful for liquor manufacturers to become interested directly or indirectly in any license for the sale of intoxicating liquors at retail, and fixing a penalty for violation did not become the law until after the contract in question was executed, but it would seem this makes no material difference in the case. Under our law, as it existed prior to the passage of this statute, it was unlawful to issue a license to any person other than the real party in interest, for the reason that a license was a personal trust to the licensee named in it, and that it

was to the public interest that such licensee should have and maintain exclusive control of, and be personally responsible for, the manner of operation of the saloon. A contract, therefore, interfering with that control and placing the control in fact in some other than the licensee named, would be against public policy, and, so far as the questions to be determined in this case are concerned, we may assume that such contract of principal and agent would be utterly unenforceable and void as between the saloon-keeper and the undisclosed principal.

2. What effect, then, did the illegality of such contract have upon the right of plaintiff in this case?

Were it not for the illegality mentioned, it is well settled plaintiff could recover against the defendant under the facts stated in the petition. An undisclosed principal is bound by simple contracts made by its agent when the acts done by the agent are within the scope of his authority and in the course of his employment. Under the allegations of plaintiff's petition, it appears that Prenica was so acting, and that the bond procured was for defendant's benefit and as a necessary incident to the carrying on of defendant's business. Such rule of law, except in the case of certain contracts as those concerning real estate or specialties, is firmly established. *Dworak v. Dobson,* 102 Neb. 696; *Lamb v. Thompson,* 31 Neb. 448; *City Trust, Safe Deposit & Surety Co. v. American Brewing Co.,* 75 N. Y. Supp. 140, 84 N. Y. Supp. 771.

3. It must be conceded, however, that plaintiff can recover, if at all, only by reason of the illegal contract between Prenica and the defendant.

Plaintiff was not a party to this illegal contract. It did not wittingly furnish a bond for the purpose of aiding in the unlawful arrangement. When it loaned its credit in the form of this bond, it was acting in reliance upon Prenica and his apparent ownership of the business engaged in.

Is the contention tenable that the defendant should be allowed to further its own interests and reap a benefit

from such an unlawful arrangement, and, at the same time, not be compelled to pay for goods or credit innocently furnished to it by parties who relied upon the fact that such an unlawful arrangement did not exist? That is the contention of the defendant.

The plaintiff and defendant are not in *pari delicto*. In fact the petition shows that the plaintiff is entirely free from any wrongful or unlawful purpose. We are of opinion that it is in the interest of public policy that the innocent party in such a transaction should be granted protection and saved from the loss of that right which would unquestionably exist were no wrongful act on the part of the other involved. 13 C. J. 498; *Darling v. Kipp*, 93 Neb. 781; *Griffin v. Chriswisser*, 84 Neb. 196; *Klein v. Pederson*, 65 Neb. 452; *Bateman v. Robinson*, 12 Neb. 508; *Grey v. Callan*, 133 Ia. 500.

Our court has gone further in granting relief than is required in this case. In *Kittle v. DeLamater*, 4 Neb. 426, the defendant had employed a printer to make maps containing a lottery scheme, when such lottery was prohibited by statute. The court held that, though the printer had knowledge of the purpose for which the maps were specially made and printed them for the purpose intended, yet, as he took no part in their publication and distribution, recovery could be had upon a note given by defendant for these services, since the printer was not in *pari delicto* with the defendant.

It is the general rule that, where a person sells or furnishes articles to another and knows they are to be used for an illegal purpose, such knowledge alone does not make him *particeps criminis* with the party who intends to so use them, unless the goods are of such a nature as to have a direct connection with the unlawful business in such a way as to show an unlawful intent common to both parties. 13 C. J. 518.

We are, therefore, of opinion that, from the allegations of the petition, it appears that the contract here sued

upon was binding upon the defendant according to its terms.

4. It is further argued that, if there was a cause of action against defendant upon the contract, it is now barred by the statute of limitations. Suit was commenced September 26, 1917. The petition sets out a list of individual items of expenditures to which the plaintiff had been subjected by reason of its obligation on the bond. These expenditures began with an item in December, 1909, and occurred at intervals until the last expenditure on April 29, 1915; some expenditures were made more and some less than five years prior to the commencement of this suit.

It is the rule on indemnity contracts that the cause of action to recover indemnity does not accrue until the loss occurs, and it follows that the statute of limitations in this case would not, in any event, commence to run as to any of the individual expenditures until the date when the expenditure was made. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282.

5. But it seems to us that in this case the cause of action on the several expenditures would not begin to run against this defendant until June 15, 1916, when the plaintiff ascertained that the contract was in fact the contract of this defendant. By the allegations of the plaintiff's petition it is made to appear that Prenica was placed in possession of the property, allowed to represent that the stock and fixtures were of the value of $4,200, were free from incumbrance and were his property, and to hold out that he was the proprietor entitled to the earnings of the business. The defendant was responsible for these representations, and they were false. In fact the defendant was, in violation of law and contrary to the representations made by Prenica, standing over Prenica as an undisclosed principal, and was in fact receiving the benefits of the bond furnished by the plaintiff, and in fact owned the property and was entitled to all the earnings and profits of the business. We take it

that this was more than mere silence on the part of the defendant, but was an affirmative device on its part to conceal the facts and to prevent its being known that it was the proprietor of the business and subject to the obligations accruing from the operation of such business. Such concealment of fact prevented the plaintiff from knowing the identity of the party to whom it was actually furnishing credit, and the plaintiff was thus prevented from discovering that it had a cause of action against this defendant. Under such circumstances, it not appearing that the facts might have been sooner discovered by the plaintiff, the statute of limitations would begin to run from the time in 1916 when plaintiff first learned of its cause of action. 25 Cyc. 1214.

For the reasons given, we believe the petition states a cause of action, and that the demurrer should have been overruled. We therefore recommend that the cause be reversed and remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

W. T. RAWLEIGH MEDICAL COMPANY, APPELLANT, V. FRED BUNNING ET AL., APPELLEES.

FILED JANUARY 31, 1920. No. 20656.

1. **Corporations: CHANGE OF NAME: ACTIONS.** A contract with a corporation which subsequently changes its name, its identity remaining the same, may sue in the new name of the corporation. It may recover on any contract under the new name that it could have recovered on under the old name, even a contract of guaranty running to the corporation under its old name. The third paragraph of the syllabus in *Crane Co. v. Specht*, 39 Neb. 123, overruled.

2. ———: ———. A change of corporate name does not make a new corporation, but only gives the corporation a new name.

APPEAL from the district court for Dundy county: ERNEST B. PERRY, JUDGE. *Reversed.*

Ratcliffe & Ratcliffe and *John L. Rice,* for appellant.

Hines & Hines and *Lambe & Butler, contra.*

TIBBETS, C.

This is an action by the plaintiff appellant against the defendants, appellees, to recover from the defendants the sum of $500 on a contract of guaranty. Judgment for the defendants.

The petition originally filed in this case was entitled "The W. T. Rawleigh Medical Company, now The W. T. Rawleigh Company, a Corporation." Afterwards the plaintiff, on motion, was allowed to amend the title of the case by striking out "The W. T. Rawleigh Medical Company now." Plaintiff alleged that on or about the 30th day of March, 1915, it entered into a written contract with one Lee Huggans for the sale of certain commodities by the plaintiff under the name of The W. T. Rawleigh Medical Company to the said Lee Huggans, as he might order them at the wholesale list prices f. o. b. cars at Freeport, Illinois. It appears that the plaintiff had formerly sold goods to Lee Huggans, and that there was a balance due from Huggans to plaintiff of $641.96. There was an agreement in writing entered into between the plaintiff and defendants herein, attached to the agreement between plaintiff and Huggans, that for and in consideration of the extension of further time to Huggans in which to pay his account for goods previously bought by him from the company, and the further consideration of The W. T. Rawleigh Medical Company extending further credit to said Huggans, defendants jointly and severally agreed to guarantee the plaintiff company for the payment in full of the balance due the company on said account, and the payment in full of all goods thereafter purchased by said Huggans. There was also included in the contract of guaranty this provision: "And we further agree that, in any suit brought on this con-

tract of guaranty by the company, no other or further proof shall be required of it than to establish the amount or sums of money due and owing to it from the said second party, and when so proven shall be conclusive and binding upon us, and that any extension of time shall not release us from liability under this contract of guaranty." The plaintiff also alleges that on the 5th day of April, 1915, the corporate name of the plaintiff was changed, and now is The W. T. Rawleigh Company, and that it is a corporation doing business under the laws of the state of Illinois, and that the plaintiff is the same corporation which was heretofore known and named as "The W. T. Rawleigh Medical Company," and that each and all of the contracts herein mentioned were entered into by the plaintiff under its former name.

The defendants' answer denies specifically that The W. T. Rawleigh Medical Company was a corporation, admits that they signed a certain contract of guaranty guaranteeing certain promises on the part of one Lee Huggans, and denies all other allegations contained in the petition not therein admitted. They allege that the contract of guaranty executed by them on or about March 30, 1915, covered only goods sold and delivered to the said Lee Huggans, and not to any other person; that the said Lee Huggans neither ordered nor received any goods from the party of the first part to the said contract, at any time after the date of signing said alleged contract. To this the plaintiff filed a reply and a general denial of the allegations contained in the answer, alleging that all the goods mentioned in the plaintiff's petition were ordered under and in pursuance of the said contract and guaranty mentioned in the said petition, and were made at the request of Lee Huggans and with his approval and consent, and that the goods were sold and delivered to the said Huggans under and by virtue of the contract of guaranty, and whatever person actually got the goods or ordered them did so in the name and as the agent of said Huggans and with Huggans' knowledge, consent and

approval and also of the defendants under the said contract of guaranty, and that the defendants had full knowledge of the manner and for whom the goods were ordered and of the entire transaction, and that they knew also that the plaintiff was selling and delivering and extending credit for said goods under said contract of guaranty, and made no objection thereto, and in no way disclaimed or notified the plaintiff that said goods were being received by any other person than the said Huggans, and that they had full knowledge of all the facts, circumstances and relation of the parties, and thereby are estopped from setting up, asserting or claiming that Lee Huggans did not order said goods or receive said goods, or that the same were not ordered, sold, delivered and received, and credit extended therefor by reason of the contract of guaranty.

The plaintiff introduced in evidence at the trial its written contract with Huggans, and also the guaranty of defendants. It also introduced testimony to show that the goods were ordered by Huggans, or at least ordered in writing by a person who signed the name "Lee Huggans;" that the goods were delivered to Huggans f. o. b. Freeport, Illinois. Plaintiff also attempted to show that there was a balance yet due in payment of the goods furnished under the contract and guaranty. Upon the conclusion of the plaintiff's testimony, a request was made by the attorneys for the defendants by a written motion to dismiss said action, and for a judgment for the defendants, for the reason that the testimony and the evidence were insufficient to support a verdict and judgment for the plaintiff. The court sustained the motion, and discharged the jury from further attendance upon said action, and rendered judgment for the defendants, from which the plaintiff appeals.

The main issue appears to be that the change of name of the corporation after the contract was entered into prevented the plaintiff from maintaining this action against the defendants under the contract of guaranty.

In this case the rulings of the district court complained of must have been principally based upon the decision of this court in the case of *Crane Co. v. Specht,* 39 Neb. 123, and, if we adhere to the rule as laid down in that case, there would be no question but that our duty in the present case would be to affirm the judgment of the district court; but we are unable to adopt that rule, which is: "Where S. guaranteed the account of L. with the C. Bros. Mfg. Co., a corporation, for goods supplied and to be furnished by it to L., and the corporation afterward changed its name to Crane Company, and after the change furnished goods to L., *held,* in an action by the Crane Company on the guaranty to recover the value of such goods, that S. was not bound." The rule is too broad and too universal in its application, and contrary to a large majority of the best considered decisions. The facts in the present case are similar in all essential particulars to the case of *Crane Co. v. Specht, supra,* and involve the same question.

In the case of *Springfield Lighting Co. v. Hobart,* 68 S. W. 942 (98 Mo. App. 227) it was held: "Where a surety executed a bond, conditioned that his principal would faithfully fulfil a certain contract whereby it agreed to furnish power for an electric light company to operate its apparatus, and afterwards the electric light company was consolidated with another company, and a new corporation formed, the surety continued liable to the new corporation for the performance of the contract." The questions arising therein were exhaustively discussed and numerous authorities cited supporting the conclusion arrived at.

In the case of *Rawleigh Co. v. Grigg,* 191 S. W. (Mo. App.) 1019, a case similar to the present one, the court held: "Where a contract sued on by a corporation was made with it before its name was changed, it is sufficient for it to allege no more than that it entered into the contract by its former corporate name, even though the contract be one of guaranty. A change of corporate name

does not make a new corporation, but only gives the corporation a new name." And, in the opinion, the court in its criticism of the case of *Crane Co. v. Specht, supra,* said: "We are cited to the case of *Crane Co. v. Specht,* 39 Neb. 123, 42 Am. St. Rep. 562, as holding that a corporation taking a contract of guaranty for the payment of goods to be sold and thereafter changing its corporate name cannot hold the guarantor for goods sold by the new corporation. This is carrying the doctrine that contracts of guaranty will be strictly construed to the extreme limit, and appears to overlook the fact that a change of name does not make a new corporation, but only gives it a new name. This last case is cited with approval in *Lester Piano Co. v. Romney,* 41 Utah, 436; but this case is based on the holding that there was a change in the corporation itself. A contrary doctrine, and one more consonant with reason, is held in the Alabama case (*Ready & Banks v. Mayor,* 6 Ala. 327), and in *Philadelphia & Reading Coal & Iron Co. v. Daube,* 71 Fed. 583; *City Nat. Bank v. Phelps,* 97 N. Y. 44, 49 Am. Rep., 513; *People v. Backus,* 117 N. Y. 196. See, also, note to *Lyon & Co. v. Plum,* 14 L. R. A. n. s. 1231."

In the case of *Miller & Bro. v. Mummert,* 196 S. W. (Tex. Civ. App.) 270, the court held: "An authorized change in the name of a corporation has no effect on its indentity, nor on its rights and obligations."

The above cases are amply sustained in 10 Cyc. 155; 3 Thompson, Corporations (2d. ed.) sec. 3191; *New York African Society for Mutual Relief v. Varick,* 13 Johns. (N. Y.) 38; *Medway Cotton Manufactory v. Adams,* 10 Mass. *360; *Philadelphia & Reading Coal & Iron Co. v. Daube,* 71 Fed. 583; *City Nat. Bank v. Phelps,* 97 N. Y. 44; *Ready & Banks v. Mayor,* 6 Ala. 327; *Philapy v. Aukerman-Bright Lumber Co.,* 56 Ind. App. 266; *Miles Lamp Chimney Co. v. Erie Fire Ins. Co.,* 164 Ind. 181; *People v. Backus,* 117 N. Y. 196. Additional authorities might be cited sustaining the rule adopted by the court in the case of *Rawleigh Co. v. Grigg, supra.*

There is also a line of authorities that would seem to sustain the rule adopted in the case of *Crane Co. v. Specht, supra.* In the case of *Lamm & Co. v. Colcord,* 22 Okla. 493, 19 L. R. A. n. s. 901, the Nebraska case was cited and relied upon, at least as far as the introduction of evidence showing that the indentity of the parties was the same, was concerned. It was also held in the case of *Coan v. Patridge,* 98 N. Y. Supp. 570: "A guaranty of the payment of all moneys to become due from a merchant for merchandise did not extend to the liability of a firm composed of the merchant and one whom he subsequently took into partnership with him." The same was held in the case of *Bill v. Barker,* 16 Gray (Mass.) 62.

In the case of *Lyon & Co. v. Plum,* 75 N. J. Law, 883, 14 L. R. A. n. s. 1231, it was held: "A guaranty to a firm of a customer's running account is not operative as to credit extended after the admission into such firm of a new member, in the absence of anything to show that such change in the firm was originally contemplated by the guarantor." This rule was adhered to in the case of *Cosgrave Brewing & Malting Co. v. Starrs,* 5 Ont. (Canada) 189; *Penoyer v. Watson,* 16 Johns. (N. Y.) *100. Other decisions to the same effect might be cited, but an investigation of those decisions will disclose that almost universally the guaranty was running to a partnership, and not to a corporation.

The distinction between a partnership and a corporation is fully defined in 10 Cyc. 146, which reads as follows: "The essential distinctions between a corporation and a partnership are: (1) A corporation possesses 'perpetual succession,' while a partnership does not; that is to say, the members of a corporation (and this applies to an unincorporated joint-stock company) may freely transfer their shares to outside persons, except so far as restrained from so doing by the terms of the charter or other constituent instrument, and thus introduce new members into the corporation in their stead, while in case

of a partnership if a member retires from the firm or dies it works a dissolution. (2) In the case of a corporation the members are not agents for the incorporated body, unless specially clothed with power as such. The shareholders act through a board which they create and cannot in general bind the corporation by their individual action, although all of them concur. Whereas in a general partnership each member is an agent for the partnership with respect to all matters within the scope of the partnership business. (3) The members of a general partnership are individually liable for the debts of the firm, jointly and severally; whereas, subject to statutory and special qualifications hereafter explained in this article, the members of a corporation are not so liable."

In a partnership the personal equation is taken into consideration, the character, business acumen, industry, skill and financial standing of the members composing the partnership, the success of the enterprise depending upon the individual efforts of the members. If a member retires from the firm or dies, the partnership is dissolved. If a new member is taken into the partnership, it may add to or detract from its success. In a partnership generally each member is an agent for the partnership; in a corporation, if a stockholder and officer dies or disposes of his stock, it does not work a dissolution. As stated, the stockholders work through a board having in general full control of the conduct of the business. Finally, a change in the partnership works a dissolution. But in a corporation a change in the stockholders' board of directors and officers, if made frequently, works no change in the corporation as far as the liabilities, contracts or assets of the corporation are concerned. This is an age of corporations; the preceding statements of the law governing corporations are of general knowledge.

A corporation is a distinct entity; the change of name, amount of stock—increased or diminished—extension or contraction of business, does not, under ordinary circumstances, change its liabilities or contracts. These facts

are legal facts, and should have been known to the defendants when they entered into the contract of guaranty. That "guarantors are favorites of the law" is true, but that rule cannot be extended as claimed and insisted upon by the defendants herein. The corporation is the same with which they made their contract, only the name is changed; and the plaintiff, as disclosed by the record, had a right, and it was its duty, to bring the action in the changed name, and the rulings of the trial court based upon the decision in *Crane Co. v. Specht, supra,* were erroneous.

In the trial of this case it would seem that the defense was based more upon excluding such testimony introduced by plaintiff as was necessary to make its case than in meeting the case by introducing evidence of their own, and in fact they must have relied upon the case of *Crane Co. v. Specht, supra.* We find, upon an examination of the record, that a great many of the answers of the witness J. L. Jackson were by the court excluded wrongfully. The record does show, however, that evidence was offered to show that the plaintiff is a corporation, that it made the contract with Lee Huggans, and the contract of the guarantors attached thereto; that said contract and the guaranty running therewith were entered into by the plaintiff under the name of The W. T. Rawleigh Medical Company, an Illinois corporation. The contract was purported to be signed by Lee Huggans, and the guaranty attached thereto by the defendants. On the 5th day of April, 1915, the name of the plaintiff was legally changed to The W. T. Rawleigh Company, but the place of doing business, the character of the business and the indentity of the corporation remained the same. The agreement provided that the sales from plaintiff to Huggans should be f. o. b. cars at Freeport, Illinois, or, at plaintiff's option, at any other regular place of shipment. Plaintiff introduced in evidence invoices and bills of lading for goods shipped to Lee Huggans, on which payments were made and acknowledgment of indebtedness

signed "Lee Huggans." Defendants contend that Lee Huggans never signed the contract and never purchased goods from plaintiff. Sanford E. Huggans, who was called as a witness for plaintiff, testified that he was the father of Lee Huggans; that he commenced to sell plaintiff's goods in 1913, carrying on the business in his son's name as the plaintiff would not make a contract with him, as he was too old; that on all letters to the plaintiff relating to the goods purchased the signature was made by him, but he signed the same "Lee Huggans;" that he received the goods billed to Lee Huggans by plaintiff, sold them, and remitted such money as was paid for them in the name of Lee Huggans. He further testified that the guarantors, with the possible exception of Walter Burt, knew, prior to signing the guaranty, that witness and Lee Huggans, his son, were conducting the business. The court excluded all questions that tended to establish agency, and all explanations witness may have made to the guarantors. There was nothing in the record to indicate that the plaintiff knew that the father, and not the son, was conducting the business, and when plaintiff consigned goods ordered in the name of Lee Huggans f. o. b. cars at Freeport, Illinois, to Lee Huggans, from that moment Lee Huggans became the owner and possessor of the goods, and they were sold and delivered by virtue of the contract with Lee Huggans and the guaranty of defendants. It was not the duty of the plaintiff to ascertain whether Lee Huggans sold the goods himself or through an agent. The guarantors were to pay plaintiff for such goods as Huggans purchased.

We think the court erred in excluding the testimony of agency and knowledge of defendants as to the arrangement between father and son, of which the defendants had knowledge; that the court erred in rendering judgment without the interposition of a jury.

For the reasons here given, we recommend that the third paragraph of the syllabus in the case of *Crane Co. v. Specht*, 39 Neb. 123, be overruled, and that the judg-

ment of the district court be reversed and the cause remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

JOSIE CHANEY, APPELLANT, V. VILLAGE OF RIVERTON, APPELLEE.

FILED JANUARY 31, 1920. No. 20702.

1. **Municipal Corporations**: CARE OF STREETS. Municipalities are by statute given control over the streets within the municipal boundaries, and become subject to the correlative duty of exercising due care to keep them free from such structural defects or obstructions, or such physical conditions in immediate connection with them, as will impair their use or endanger those traveling upon them.
2. ———: ———: OBSTRUCTIONS: LIABILITY. Where a platform is constructed by citizens upon a principal street of a village, for the purpose of holding thereon a public entertainment, and is so constructed as to be insufficient to sustain the crowd, and by reason thereof falls and injures a pedestrian upon the street, *held* that, as the platform had been constructed for several days and a sufficient length of time for the village authorities to be aware of its location and condition, it became the duty of the village authorities to abate it as a nuisance, and, having failed to do so, the village could be held liable for damages for the injury.
3. ———: ———: ———: ———: NOTICE. Under a statute, providing that a village shall not be liable for damages arising from "defective" streets, unless, within 30 days after the occurrence of the accident, a notice in writing be filed with the village authorities, *held* that a platform, constructed in a village street and in such condition as to endanger pedestrians passing on the street, renders the street "defective" within the meaning of that statute, and that plaintiff, injured by reason of the fall of the platform, was required to give the statutory notice as a condition precedent to her right to sue.

APPEAL from the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Bernard McNeny, for appellant.

George J. Marshall and *George Losey, contra.*

FLANSBURG, C.

Action for damages resulting from personal injuries. Verdict was rendered in favor of the plaintiff, and the court, notwithstanding the verdict, rendered judgment in favor of the defendant. From this judgment the plaintiff appeals.

On or about July 2 or 3, 1913, citizens of Riverton, a village of some eight or nine hundred people, constructed a wooden platform upon one of the main streets of such village for the purpose of giving a Fourth of July entertainment thereon. The celebration was held on July 5, and, when crowds had gathered around and upon this platform, the plaintiff, who was passing by, saw her small boy on the platform and approached to take him away. As she withdrew, the platform, being insufficient to support the crowd, collapsed and struck her, causing the injuries complained of.

Two questions are presented: Whether the facts stated are sufficient to fix a liability upon the village; and, if so, whether plaintiff's right to sue is barred by her failure to give written notice of her accident and claim for damages as required by section 5194, Rev. St. 1913.

Municipalities are by statute given control over the highways within their limits, and, under our decisions, become subject to civil liability for failure to perform the correlative duty of keeping them in repair and free from such obstructions and conditions as impair or make dangerous their use. The liability for failure to perform such duties arises by necessary implication from the privilege of control over the streets granted, and is therefore a liability statutory in its nature. *Tewksbury v. City of Lincoln,* 84 Neb. 571; *Updike v. City of Omaha,* 87 Neb. 228.

By section 5131, Rev. St. 1913, defendant was given control over its streets, and power to prevent and remove all encroachments, and to prevent all games, practices and amusements upon the streets likely to result in damage to any person or property. Under this power of full control conferred for the public good, the village was required to exercise due care in keeping its streets free from such structural defects or obstructions, or such physical conditions in immediate connection therewith, as would impair its use or endanger those traveling upon it. *Bemis v. City of Omaha,* 81 Neb. 352; *City of Richmond v. Smith,* 101 Va. 161; *Parker v. Mayor and Council of Macon,* 39 Ga. 725; *Bliven v. City of Sioux City,* 85 Ia. 346; *McCollum v. City of South Omaha,* 84 Neb. 413.

In the cases just above cited, the condition produced by a brick wall of a building, after a fire, left standing next to the sidewalk and in danger of falling on those using the street; or a billboard in a weakened or decayed condition, standing so that it might be blown into the street; or a platform built in the street, such as the one in the instant case, was, in each case where involved, held to be a nuisance in connection with the street, and which the city was obliged to use due diligence in discovering and removing.

Such a duty it owes in its private or corporate capacity, and not in its governmental capacity. Those cases, therefore, having to do with a nuisance created upon the street by the active use of it, such as by riots, the shooting of fireworks or cannons, or by horse races or coasting on the snow, are to be distinguished, for in such cases the nuisance has no structural connection with the street, nor with the surrounding physical conditions, but is an unlawful proceeding upon the street which the city is called upon, in its governmental capacity, to prevent, and for failure to do so, since it acts in its governmental capacity, it is not held liable.

The platform built upon the street, as is shown in the instant case, was an unlawful obstruction. It was one the village had no power to license, had it tried. It was a nuisance in the street, and, under the circumstances shown, its presence and character must necessarily have been known to the village authorities. Nevertheless it was suffered to remain in violation of the positive duty of these village authorities to remove it.

The damage occurring to the plaintiff, while she was passing by and in the exercise of a proper and lawful use of the street, as a street, was one which might reasonably have been anticipated, and the platform was a cause of danger in the street which the village should have guarded against and prevented.

There being a liability, therefore, was it necessary that plaintiff give written notice under section 5194, Rev. St. 1913? By that section of the statute it is provided that a village shall not be liable "for damages arising from defective streets, alleys, sidewalks, public parks or other public places" unless within thirty days after the occurrence of the accident a notice in writing of the accident and of the time and place it occurred be given to the village authorities.

Was the condition created by the platform, built and used for the purpose shown, a defect within the meaning of this statute just referred to?

In the interpretation of this statute it is necessary to consider the purpose of its enactment. By placing the control of the streets in the municipalities, the legislature created obligations from which a new class of liability for damages would arise which were not recognized at common law. The object of the statute was to enable city officials to properly investigate the nature and validity of such claims at a time when knowledge of the facts relating to the accident could be ascertained, and such information preserved for use by such officials as might be in charge of the cities' affairs when the matter later came up or the case was tried or defended,

and in order that spurious or unmeritorious claims might be avoided.

The reason for such a rule would obviously obtain whether a liability should arise from the failure of the city to repair some defect in the paving or in those things which are a technical part of the street, or whether from a failure or neglect to perform its broad and general duty, to remove or correct all such structures or obstructions which endanger the security and safety of those traveling on the street.

We find that the courts have given a liberal meaning to the word "defect" as used in such statutes, with the evident purpose of carrying out the spirit and intent of the act. The following have been defined to be defects in the street as used in like or somewhat similar statutes: A condition where an awning was constructed over the street, so that, when snow accumulated upon it, it fell into the street; where a sign was constructed in the sidewalk space and by reason of decay fell; where a road scraper was left in the street; where a log or tree tops were left upon the roadway; where a rope used in moving a building was stretched across the street; where a telegraph wire had fallen across the street; where a road was closed by a wire; and where an accumulation of ice and snow was allowed to remain on the street. *Hume v. Mayor,* 74 N. Y. 264; *Bliven v. City of Sioux City,* 85 Ia. 346; *Whitney v. Town of Ticonderoga,* 127 N. Y. 40; *Craig v. Inhabitants of Leominster,* 200 Mass. 101; *Hayes v. Hyde Park,* 153 Mass. 514; *Bills v. Town of Kaukauna,* 94 Wis. 310; *Carpenter v. Town of Rolling,* 107 Wis. 559; *Kelsey v. Town of Glover,* 15 Vt. 708; *McCollum v. City of South Omaha,* 84 Neb. 413.

In the case of *Bemis v. City of Omaha,* 81 Neb. 352, a billboard had been placed on or near the sidewalk space and blew over, injuring a passerby. A statute almost identical with the one involved here required written notice in case of a claim for damages arising from

"defective streets." Though the question of the meaning of the word "defective" was not discussed, the court treated the case as governed by this statute, the notice filed was found sufficient, and a recovery was allowed as for a defective street.

We have carefully examined the cases cited by plaintiff. In *McArthur v. City of Saginaw,* 58 Mich. 357, and in *Keith v. Inhabitants of Easton,* 84 Mass. 552, a vehicle in one case, and a pile of lumber in the other, had been placed so as to stand within the platted limits of the highway, but not within the improved and traveled portion, and were therefore not considered obstructions in the street, and not defects, since it was held the city was given discretion as to how much of the platted highway should be used and improved for a road. In the case of *Hixon v. City of Lowell,* 13 Gray (Mass.) 59, snow and ice hanging from the eaves of a building, abutting on the street, fell and caused injuries. The court said this was not a defect in the street. However, the court in that case approved and distinguished a former Massachusetts case, in which recovery was allowed, where an awning, built out over the street, fell by reason of an accumulation of snow upon it. In the case of *Hughes v. City of Fond du Lac,* 73 Wis. 380, a street roller was left in the street by a city employee, and the court, in large part, reasoned that, though this was not a defect in the street, notice was not necessary in such a case, in any event, because the act of leaving the scraper in the street was an act of direct malfeasance on the part of an agent of the city, of which the city was bound to take notice. And in the case of *Barber v. Roxbury,* 11 Allen (Mass.) 318, a city marshal, searching a cave near a highway for stolen goods, was removing large stones with a derrick, and allowed a rope of the derrick, which moved up and down as the crank of the derrick was turned, to extend across the highway. The court said this was not a defect, but stated, "Anything in the state or condition of the highway, which renders it unsafe or

inconvenient for ordinary travel, is a defect or want of repair," and went on further to say that a defect would include obstructions or obstacles, a stone, or a log on the surface, or a barrier across the way.

It appears to us that the platform in the instant case, by reason of its position, created a danger to travelers on the highway, and was such a condition and so interfered with the proper attributes of the highway as to be within the meaning of a defective street. It therefore follows that plaintiff, having failed to file notice as required under the statute, cannot maintain her action.

For the reasons given, we recommend that the case be affirmed.

DORSEY, C., not participating.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted and made the opinion of the court.

AFFIRMED.

IDALYN GWYER YATES ET AL., APPELLEES, V. THOMAS HOCTOR ET AL., APPELLANTS.

FILED FEBRUARY 14, 1920. No. 20737.

Adverse Possession: REVIEW: EVIDENCE. Evidence contained in the purported bill of exceptions examined, and *held* sufficient to support the verdict; *held*, further, that no prejudicial error is shown in the record.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

C. W. Sears and *Henry J. Beall,* for appellants.

Charles W. Haller, contra.

LETTON, J.

By this action plaintiffs sought to recover possession of a small tract of land, basing their title upon adverse

possession by themselves and by their grantors for more than thirty years. The defense is a general denial and a plea of title derived from the United States through mesne conveyance.

What purports to be a bill of exceptions is attached to the record, but the same bears no evidence of ever having been allowed by the trial judge, and it is not certified by the clerk of the district court. It is of no legal force as evidence, and since the pleadings support the judgment, the case must be affirmed. However, we have examined the purported bill far enough to satisfy ourselves that the evidence, if it had been properly prepared, would have sustained the verdict. The refusal to give instruction No. 2 requested by defendant, which seems to be the principal error relied upon, was not prejudicial, since, even if it is assumed that the entering of the decree in the case of *Stephens v. Flemy*, No. 9139 (affirmed without opinion), interrupted the adverse possession of E. Martin Stephens, there was sufficient evidence of adverse possesion for the statutory period after that time to sustain the judgment.

AFFIRMED.

DAY, J., not sitting.

FARMERS IRRIGATION DISTRICT, APPELLEE, V. MARY S. CALKINS ET AL., APPELLANTS.

FILED FEBRUARY 14, 1920. No. 20829.

1. **Eminent Domain: AWARD: JURISDICTION.** An appeal to the district court in condemnation proceedings was ineffective because taken too late, but the parties agreed by stipulation in that court that a portion of the right of way condemned should be surrendered and a new route taken across the defendant's land, and the damages be ascertained in the district court. *Held*, that, since the court had original jurisdiction of the subject-matter, the stipulation and appearance at the trial conferred jurisdiction of the parties, and the judgment awarding damages was not void for want of jurisdiction.

2. Appeal: NEW TRIAL: REVIEW. Where the district court passes upon the credibility of affidavits filed in support of a motion for new trial, this court will not disturb its findings unless unsupported by the evidence.

3. **Eminent Domain**: DRAINS: DAMAGES. The general rule as to the ascertainment of damages in condemnation proceedings applies to the taking of land for right of way by an irrigation district. *Gutschow v. Washington County*, 81 Neb. 275, distinguished.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

G. J. Hunt, for appellants.

L. L. Raymond, contra.

LETTON, J.

In June, 1917, plaintiff an irrigation district, procured appraisers to be appointed to condemn a right of way for a ditch through the land of defendants. An appraisement and report was made which was filed with the county judge on July 12, and on August 11, an appeal bond was filed and approved. On September 12 a transcript of the proceedings and bond were filed in the district court for the purpose of taking an appeal from the award. A trial was had in the district court and the amount of damages awarded defendants materially reduced. Defendants appeal.

Appellants maintain that the district court never acquired jurisdiction of the appeal because the transcript was not filed within 60 days as required by statute. The transcript was not filed in time, and if the parties had treated the case purely as an appeal probably no jurisdiction would have attached. But these facts are shown by the record: After the appeal had been docketed in the district court, the parties stipulated and agreed in that court that the line of right of way as located in the condemnation proceedings be changed so as to cross defendants' land upon another line. By so doing the irrigation district surrendered all claim to a portion of the land condemned, and took land elsewhere in lieu thereof, and

the owner of the land consented to the taking of this land, which was not considered by the appraisers in the condemnation proceedings. The district court has original jurisdiction of actions for damages for the taking of private property for public use. The trial proceeded as in an action of that nature. It could not be considered an appeal from the condemnation proceedings, because by mutual consent a new issue was raised not presented to the appraisers, and which they had never passed upon. When a court has jurisdiction of the subject-matter, parties may appear and confer jurisdiction over the person. Granting that the appeal was void, yet when both parties voluntarily went into a court having jurisdiction over the subject-matter and submitted to the court and jury the question as to the damages sustained by defendants on account of the taking of other property than that recovered by the award of the appraisers, they abandoned the appeal and vested the court with full and complete jurisdiction. Defendants cannot now contend to the contrary.

What has been said disposes of the objections raised to the bond given upon the appeal.

Affidavits were filed upon the motion for new trial alleging misconduct on the part of two members of the jury. These were met by counter affidavits. The issue thus raised was decided by the district court when it overruled the motion for a new trial. The question is one of veracity. That court was in a more favorable position to settle it than a reviewing court, and we find nothing in the proof that requires a reversal on this point.

It is also assigned that the damages are inadequate. The evidence is conflicting on this point, and since we cannot say the evidence was insufficient to support the finding arrived at by the jury, we are not justified in setting it aside.

The giving of instruction No. 13 is assigned as error. No instruction of that number is found in the record, but evidently No. 3 is the one meant. This instruction

states correctly the general rule for the measure of damages in condemnation proceedings. The rule laid down in *Gutschow v. Washington County*, 81 Neb. 275, is only applicable to such conditions as were shown in that case, viz., that the landowner had already been assessed and compelled to pay to a drainage district the special benefits his land had sustained by reason of the excavation of the drainage ditch, and to deduct them from his damages would make him pay twice for such benefits.

AFFIRMED.

DAY, J., not sitting.

WALTHAM PIANO COMPANY, APPELLEE, V. FRANK A. PIERSON, DEFENDANT: FRANK R. ANDERSON, APPELLANT.

FILED FEBRUARY 14, 1920. No. 20827.

1. **Partnership**: MANAGING PARTNER: POWERS. In a commercial partnership the power of the managing partner to pledge the credit of the partnership in transacting firm business is implied.
2. ———: NOTE: PRESUMPTION. The law presumes that a promissory note executed in the name of a partnership by one of the partners is the note of the partnership.
3. ———: PLEADING AND PROOF: VARIANCE. Evidence that a defendant created a liability by permitting himself to be held out as a partner may be admitted under an allegation that he is liable as a partner, and is not a fatal variance between the pleading and the proof.
4. **Evidence**: BOOKS OF ACCOUNT. As a general rule partnership books are admissible in evidence to show the affairs of the partnership as affecting the firm or the partners, but the rule does not necessarily permit the introduction of a partnership ledger to disprove a third person's claim against a member of the partnership.
5. ———: PARTNERSHIP: NEWSPAPER ADVERTISEMENT. After the proper foundation has been laid, a newspaper, containing an advertisement in which defendant, a subscriber, is represented as a member of a partnership, may be admitted in evidence to prove that he knowingly permitted himself to be held out as a partner, where that fact is in issue.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

F. L. Carrico and *L. W. Hague,* for appellant.

M. D. King, J. L. McPheely and *C. A. Chappell, contra.*

ROSE, J.

This is an action to recover the amount due on an unpaid promissory note for $552 dated October 23, 1915, including protest fees. Plaintiff is the payee. The note was signed, "Pierson & Anderson, by F. A. Pierson." The defendants are Frank A. Pierson and Frank R. Anderson, comprising the firm of Pierson & Anderson. The partnership was formed for the purpose of conducting at Axtell the general implement business. The partners were brothers-in-law. Pierson was the manager, and from a financial standpoint Anderson, who lived on a farm, was the substantial partner. After the partnership had been in operation for some time the place of business was changed to Minden. There pianos were bought and sold in the firm name in the implement store of the partnership. Under a partnership contract in writing plaintiff shipped to the firm March 31, 1915, 12 pianos and charged it therefor $1,840. Later, in settlement of the unpaid purchase price, three partnership notes were executed and delivered by Pierson. Of these the only unpaid note is the one in controversy. In the suit on the note Pierson made default. Anderson pleaded in his answer that the piano business was the individual enterprise of Pierson; that the firm never engaged in buying and selling pianos, and that such a business was never within the scope of the partnership agreement; that the firm never made a contract to purchase the pianos; that Pierson, as a partner, was without authority to make such a contract or to execute notes on behalf of the firm for the payment of the purchase price of pianos, and that in these respects Pierson acted solely for himself, and not for Anderson or for the firm, and that the unauthorized acts of Pierson were without the knowledge or consent of Anderson, who never adopted

or ratified them. The facts on which the defense is based were put in issue by a reply. There was a trial to a jury. From a judgment on a verdict against defendants for $636.54, Anderson has appealed.

The principal assignment of error is the insufficiency of the evidence to sustain the verdict. Under the instructions the jury were allowed to find against Anderson if he permitted himself to be held out as a partner of Pierson in the piano business and thus induced plaintiff to extend credit to the firm. It is earnestly argued that there is no competent evidence to sustain a verdict against Anderson on this issue, but an unbiased view of the proofs leads to a different conclusion. For a considerable time pianos were openly bought and sold in the firm name where the implement business was conducted by the partnership. Piano sales were extensively advertised in the firm name. Plaintiff shipped the pianos to the firm under a partnership contract to do so. The execution and delivery of the note in the firm name is established without question. In a commercial partnership the power of the managing partner to pledge the credit of the partnership in transacting firm business is implied. 20 R. C. L. 900, secs. 111, 112. The law presumes that a promissory note executed in the name of a partnership by one of the partners is the note of the partnership. *Schwanck v. Davis,* 25 Neb. 196; *Peck v. Tingley,* 53 Neb. 171. There is ample evidence in the record to sustain a finding that Anderson, with knowledge that pianos were bought and sold in the firm name where the implement business of the partnership was conducted, permitted himself to be held out as a partner in the piano business, and that plaintiff extended its credit on the faith of this partnership relation. On this feature of plaintiff's case alone the evidence is sufficient to sustain the verdict.

It is argued, however, that proof of Anderson's having permitted himself to be held out as a partner in the piano business is outside of the pleadings and at vari-

ance with the petition. This point does not seem to be well taken. It must be conceded, nevertheless, that plaintiff alleges affirmatively Anderson's partnership in the piano business, and that there is a failure to charge in specific terms that Anderson permitted himself to be held out as a partner therein. In the action on the note Anderson's liability as a partner in the piano business is pleaded in the petition. Proof that this liability rests on his having permitted himself to be held out as such a partner is not a fatal variance. 20 R. C. L. 939, sec. 159; *Hartney v. Gosling,* 10 Wyo. 346; *Hancock & Co. v. Hintrager,* 60 Ia. 374.

Another assignment of error challenges the exclusion of a partnership ledger offered in evidence to prove that the proceeds of the sales of pianos were not credited to the partnership. It is a general rule that partnership books are admissible to show the state of the partnership as affecting the firm or the partners. 10 R. C. L. 1176, sec. 375. It does not necessarily follow, however, that such third person is bound by the partnership books or that they are admissible against him to prove that one of the partners was not liable on a note executed by another partner who was entrusted with the management of a trading or commercial partnership. In the present instance there was no error in excluding the partnership ledger.

Another argument is directed to assigned error in admitting in evidence copies of newpapers containing advertisements of piano sales by Pierson & Anderson. The advertisements were conspicuous. The newspapers were local publications circulated generally in the community where the partnership business was conducted. Anderson was a regular subscriber when the advertisements were published. The newspapers were sent to him through the mails. He would naturally examine their contents. They contained advertisements of the piano business in the firm name. Under such circumstances they were admissible as tending to show notice

to Anderson that he was held out as a partner in the piano business. 1 Wharton, Evidence (3d ed.) sec. 675. The other assignments have also been considered without finding an error prejudicial to defendant.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

CORNISH, J., concurring.

I have concurred in this opinion. I do not understand it to hold that, where the question of partnership is in issue, the person denying that the partnership relation in fact existed may not show, in corroboration of his evidence denying the partnership relation, that no books were kept or accountings had, such as is usually the case between those who are in fact partners.

FRED BELL V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1920. No. 21260.

1. **Criminal Law: ARRAIGNMENT: HARMLESS ERROR.** In a prosecution before a justice of the peace for a misdemeanor, the conviction will not be reversed by the supreme court for a harmless error in failing to formally arraign defendant, if he had a fair trial.
2. **———: TRIAL BY JURY.** It is within the power of the legislature to enact a law declaring possession and transportation of intoxicating liquors to be misdemeanors, and providing that violators of the law may be tried before magistrates and police courts without a jury, where the penalty does not exceed a fine of $100 or imprisonment for three months.

ERROR to the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

George A. Adams and *W. W. Towle,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

ROSE, J.

In two counts of an information Fred Bell, defendant, was charged separately with the offenses of having in his possession, and of transporting, intoxicating liquors in violation of law. The complaint was made before W. T. Stevens, a justice of the peace of Lancaster county. On application of defendant the case was transferred to W. A. Hawes, another justice of the peace, before whom defendant was convicted. A fine of $100 on each count was imposed, and defendant prosecuted error to the district court, where the sentence imposing the fines was affirmed. As plaintiff in error, defendant presents for review the record of his conviction.

Defendant complains because he was not arraigned before the trial justice. There was error in this respect. The charges against defendant should have been read to him and he should have been asked whether he was guilty or not guilty. The error, however, does not require a reversal because the record fails to show that he was prejudiced. In a prosecution before a justice of the peace for a misdemeanor, the conviction will not be reversed in the supreme court for a harmless error in failing to formally arraign defendant, if he had a fair trial. *Allyn v. State,* 21 Neb. 593.

In the principal assignment of error it is asserted that defendant was deprived of his constitutional right to a trial by jury. The issues were tried by the justice without a jury under the following provisions of the statute making the possession or transportation of intoxicating liquors unlawful:

"Magistrates and police courts are hereby vested with jurisdiction to try without a jury all violations of this act and of all such ordinances wherein the penalty does not exceed a fine of one hundred dollars or imprisonment for a period of three months, and upon the conviction such magistrates and police judges shall impose sentence." Laws 1917, ch. 187, sec. 55.

Did the legislature thus exceed its power and violate the constitutional provision that "The right of trial by jury shall remain inviolate?" Const., art. I, sec. 6. The purpose of this provision was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. At that time the misdemeanors now under consideration were not recognized by the common law or by any statute then in existence. New misdemeanors and modes of trial therefor are proper subjects of legislation. The better view seems to be that the legislature acted within its powers in declaring possession and transportation of intoxicating liquors to be misdemeanors, and in providing for the trial of violators of the law before magistrates and police courts without a jury where the penalty does not exceed a fine of $100 or imprisonment for three months. While the decisions of the courts are not in harmony on this question, the conclusion reached is supported by the soundest reasons. *Inwood v. State,* 42 Ohio St. 186; *Kirkland v. State,* 72 Ark. 171; *Van Swartow v. Commonwealth,* 24 Pa. St. 131; *Tims v. State,* 26 Ala. 165; *Commonwealth v. Andrews,* 211 Pa. St. 110; *Goddard v. State,* 12 Conn. *448; *State v. Kennan,* 25 Wash. 621.

In this view of the law the sentence of the justice of the peace was properly affirmed by the district court.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

STAVROS TSIAMPRAS, ADMINISTRATOR, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 14, 1920. No. 20670.

1. **Negligence: PRESUMPTION.** The general rule, subject to certain exceptions, is that the mere fact that an accident occurs raises no presumption of negligence on the part of either of the parties to it.

2. **Master and Servant:** ASSUMPTION OF RISK. An employee of a railroad company, walking along the track in the country, assumes the risk of accident from moving trains.

3. ———: NEGLIGENCE. A member of a gang of section-men going for a pail of water, on starting in a particular direction, was called back by the foreman because he could not get through in the direction in which he had started, whereupon he went in the direction indicated, along the railroad track, and was afterwards struck by an engine. *Held*, not to constitute negligence on the part of the defendant company.

4. ———: ———. Evidence examined, and *held* not to show negligence upon the part of defendant in failing to exercise care to prevent accident after discovery of decedent in a place of danger.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Fred W. Anheuser and *Will H. Thompson & Son*, for appellant.

Edson Rich, C. A. Magaw and *A. G. Ellick, contra.*

CORNISH, J.

Plaintiff's intestate, going for a pail of water for the section-men with whom he was working, in the country, was struck from the rear by defendant's engine and killed. Action for negligence under the federal liability act. The trial court instructed a verdict for defendant. Plaintiff appeals.

The mere fact that an accident occurs raises no presumption of negligence on the part of either of the parties to it. In probably a majority of the occupations in which men engage, whether in town or country, there is necessarily more or less risk of accident. We can imagine an attempt at absolute safety carried so far as to hinder industry and production needed for the comforts and necessities of life. The farm must be worked even though the colt may suddenly manifest a vicious disposition. Besides, no such attempt is needed, because, if every one exercises that care which the law requires, those accidents which could be avoided will be avoided.

Railroad tracks and switchyards are essentially places of danger. The person employed on or about them assumes those risks of danger naturally and properly incident to the work. Those in charge of moving cars or engines are not ordinarily expected to govern their movements with reference to those so engaged, whose duty it is to look out for trains, so as not to obstruct their movements. One walking along the track, as in the present instance, should use that vigilance which protects him from approaching trains. If, as the evidence indicates, gusts carying dust might have obstructed his vision, and also the vision of those in charge of the train, then, exercising ordinary care, decedent should have walked to one side of the track for safety. The engineer would be under no obligation to slacken the speed of the train until it would appear to him, as a reasonable man, that the pedestrian was not aware of the approach of the train, or was in immediate danger.

Negligence is alleged as follows: (1) Failure to blow the train whistle or ring the bell. (2) Failure to place slow-up flags on either side of the place where the gang was working. (3) Excessive speed and failure to slow up on approaching the gang. (4) Ordering the decedent to walk down the track when the decedent had selected a safe way. (5) Failure of the gang foreman to warn the gang of the train's presence. (6) Failure to stop the train, after seeing decedent, in time to avoid striking him. We will comment in the order of the charges.

1. The evidence shows that the whistle was blown and the bell rung at the regular place for doing so. It is true that some of the members of the gang swore they did not hear it. They did not swear it was not done. This is not surprising. The train had passed them and gone a considerable distance before reaching its regular place for blowing the whistle. The three men in charge of the train swore positively that the whistle did blow. Their evidence must prevail. *Rickert v. Union P. R. Co.*,

190 Neb. 304; *Zancanella v. Omaha & C. B. Street R. Co.*, 93 Neb. 774.

2. Slow-up flags were not required. Besides, slow-up flags for the gang would not have avoided the danger to decedent, who was about three-fourths of a mile distant.

3. The speed of 40 miles an hour was not excessive.

4. Defendant did not order decedent, as claimed in plaintiff's brief, to walk between the rails. He was free to walk on either side of the track. Plaintiff introduced evidence that, when decedent started for water, the foreman called him back, telling him that he could not get through in the direction in which he had started. This would not constitute neligence.

5. The evidence shows that the gang had been instructed as to the danger of passing trains. They would know, and be bound to know, the danger without specific instructions. The foreman would not know the exact times that trains would pass.

6. The track in either direction from where decedent was struck was for a considerable distance in a straight line. The engineer and fireman testified that from the time of seeing the decedent on the track everything was done that was possible to stop the train. The fact that he was not seen until about 200 feet distant is accounted for by occasional gusts containing dust present upon that day. His presence at the particular point where he was killed could hardly have been anticipated. The engineer and fireman testified to blowing the whistle at the regular place, when about 1,000 feet distant from the decedent. The fireman in his testimony became a little confused as to when he first saw decedent, but he testified positively that when he first discovered him the engineer had already seen him and was applying the brakes and ringing the bell. His testimony, fairly considered, corroborates that of the engineer. The distance was too short for stopping the train in time.

We find no negligence upon the part of the trainmen in failing to give the usual warnings, in failing to discover the dangerous condition of decedent, or in failing to do what they might have done after discovering him in a place of danger. The accident occurred by reason of decedent's failure to avoid those dangers, which it was his duty to avoid, and the risk of which he assumed.

For cases bearing upon the questions considered, see *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783; *Merkouras v. Chicago, B. & Q. R. Co.*, 101 Neb. 717; *Anderson v. Missouri P. R. Co.*, 95 Neb. 358; *Aerkfetz v. Humphreys*, 145 U. S. 418; *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441; *Casey v. Boston & M. R. Co.*, 231 Mass. 529; *Johnston v. Delano*, 100 Neb. 192; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627; *Jacobs v. Southern R. Co.*, 241 U. S. 229; *Glantz v. Chicago, B. & Q. R. Co.*, 87 Neb. 60; *Hooker v. Wabash R. Co.*, 99 Neb. 13; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548.

AFFIRMED.

DAY, J., not sitting.

FRANK DILLARD V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1920. No. 21021.

1. **Statutes:** CONSTRUCTION. The rule *ejusdem generis*, that, where particular words are followed by general, the general words are restricted in meaning to objects of the like kind with those specified, is only an aid to interpretation, and yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.
2. **Sunday:** CONSTRUCTION OF STATUTE. The words, "or place of business," contained in a Sunday observance ordinance, set out in the opinion, construed to include moving picture shows.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

Lambert & Armstrong, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes, Ralph P. Wilson and *Ernest F. Armstrong, contra.*

CORNISH, J.

Section 2 of the Sunday observance ordinance of the city of Auburn provides as follows: "No person, firm or corporation shall sell, barter or trade, or offer to sell, barter or trade, any goods, wares and merchandise or keep open any store, shop or place of business for the purpose of pursuing such business, on the first day of the week commonly called Sunday, except as hereinafter provided." Section 3 of the ordinance provides: "The provisions of section 2, shall not apply to, nor be construed to include hotels, boarding houses, restaurants, ice cream parlors, drug stores, garages or livery barns; provided, however, that it shall be construed a violation of this ordinance for any business store or shop herein excepted from the provisions of section 2 to sell," etc.

Are moving picture shows on Sunday forbidden by the ordinance? The defendant (plaintiff in error) invokes the rule *ejusdem generis* that, where particular words are followed by general, the general words are restricted in meaning to objects of the like kind with those specified. In other words, it is thought that the words "place of business" in section 2 can include only those places where goods, wares or merchandise are sold, bartered or traded. It is argued that moving picture shows, being places of amusement, are not included in "such business" so particularized.

We cannot agree. The doctrine invoked yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed. The rule *ejusdem generis* is only an aid to interpretation. The main object is to gather from the language used the intention of the lawmakers. The passage under consid-

eration may be best interpreted by reference to what follows it. In section 3 hotels, garages and livery barns are excepted. Why this necessity, if the construction which defendant would adopt is correct? They are not places where goods, wares or merchandise are sold, bartered or traded.

Where the expression in the statute is particular, but the reason is general, the expression should be deemed general. Furthermore, the particular words used, places where goods, wares or merchandise may be sold, bartered or traded, would seem to be exhaustive of the class referred to, and would therefore, under the proposed construction, render unnecessary the words "or place of business." This would violate the rule that all of the words used would, if possible, be given meaning and effect.

See *Follmer v. Nuckolls County*, 6 Neb. 204; *Swearingen v. Roberts*, 12 Neb. 333; *City of St. Joseph v. Elliott*, 47 Mo. App. 418; note to *Zucarro v. State*, L. R. A. 1918B (Tex. Cr. Rep.) 361; 2 Words and Phrases (2d series) 228; 37 Cyc. 551, 552.

We are of opinion that a moving picture show is a place of business inhibited by the ordinance under consideration.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

JOHN E. PERRY, APPELLANT, v. W. L. HUFFMAN AUTOMOBILE COMPANY, APPELLEE.

FILED FEBRUARY 14, 1920. No. 21298.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: COMMUTATION.** The district court has jurisdiction to approve or disapprove an agreement to commute to one lump sum periodical payments of compensation due for partial permanent disability, under the employers' liability act (Rev. St. 1913, sec. 3681, as amended by section 16, ch. 85, Laws 1917).

2. ———: ———: ———: APPLICATION. The statute provides that the application "shall contain a concise statement of the terms of the settlement sought to be approved, together with a brief statement of the facts concerning the injury, the nature thereof, the wages received by the injured employee prior thereto, and the nature of the employment." Its failure to state the number of periodical payments to which applicant is entitled, or failure to state the degree of permanent disability upon which the number of payments depends, although necessary to a technical statement of a commutation, is not such a defect in the pleading as to deprive the district court of jurisdiction to enter its final judgment of approval or disapproval of the settlement agreed to between the parties.

3. ———: ———: CONSTRUCTION. The employers' liability act is construed liberally and is intended to avoid formal and technical court procedure.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Anson H. Bigelow, for appellant.

Brome & Ramsey and *Joseph P. Uvick, contra.*

CORNISH, J.

The trial court, in a workmen's compensation case, overruled plaintiff's motion to vacate the judgment previously entered, approving a lump sum settlement had between the parties. Plaintiff appeals.

The motion asked vacation on the ground that the pleading or application for approval of the settlement did not state a cause which gave the court jurisdiction under the law to enter judgment. The pleading, after reciting facts which brought the parties under the compensation act, and which showed the nature and extent of the injury, for which compensation, under the law, is fixed at $12 a week, showed that the parties had agreed upon a lump sum payment in the sum of $500, and asked that the court approve the settlement. The point urged is that the application did not show that the settlement, although agreed to, was a commutation. Neither the application nor the court's order showed any agreement or finding as to the number of weekly payments to which

the plaintiff was entitled. It is insisted that there must be a finding of the number of payments due, in order to have an amount which can be commuted under the statute.

The statute provides: "The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article." Rev. St. 1913, sec. 3677, as amended by section 12, ch. 85, Laws 1917. When the compensation is due for death or permanent disability (as here) it "may be commuted only upon the order or decision of the district court." Rev. St. 1913, sec. 3681, as amended by section 16, ch. 85, Laws 1917. It further provides that, "where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests."

The compensation recoverable is proportionate to the injury or loss. The law fixes the amount to be paid weekly and the number of weeks for a total loss. If the loss is partial, the amount to be paid is determined by making a corresponding decrease in the number of weeks. In other words, if one-half the use of a foot has been lost, the compensation to be allowed would be for 62½ weeks, instead of 125 weeks, the time named in the law if the loss were total.

It would seem that, when parties attempt to settle, the main point, if any, in dispute must be the extent of the injury, which determines the number of future payments. In the case in hand, if loss were total, the payments would be $12 a week for 125 weeks. The settlement was for the lump sum of $500. The question appears to be whether the parties and the trial judge must, with mathematical precision, first proportion the loss, then compute the number of weeks, and then find the present worth of the total amount, or whether they will be permitted

to agree upon a lump sum in settlement without carrying out the computation in detail. Of course, it would be only a problem in arithmetic to make the lump sum $500 by increasing or decreasing the proportion of loss, and accordingly the number of weeks.

Although the use of the word "commute" makes the argument at least plausible, we hardly think the statute intends to impose this necessity upon the parties. Settlements are usually arrived at by compromise. The substance or meaning of a commutation will be in the minds of the parties. The trial court, in giving or withholding its approval of the agreement, should be satisfied that no advantage has been taken of the employee, either in agreeing upon the extent of the injury or the proper commutation of the compensation to which he is entitled. The court has more to do than to see that the commutation is figured accurately. It has to decide whether the settlement is a fair one and whether it is for the best interests of the employee to receive his compensation in one payment.

The statute describes what the application shall contain. It requires only a concise statement of the terms of the settlement. This, the application in question did contain. The court acquired jurisdiction of the subject-matter and of the parties.

We have held that the purpose of the statute is to give a speedy, informal and inexpensive hearing and to avoid, as far as possible, the more technical forms of court procedure. *Stoica v. Swift & Co.*, 100 Neb. 434; *Bailey v. United States Fidelity & Guaranty Co.*, 99 Neb. 109.

We are of opinion that the evidence shows that the settlement had in this case and the order entered should not be disturbed.

AFFIRMED.

DAY, J., not sitting.

The following opinion on rehearing was filed October 4, 1920. *Former opinion modified and judgment reversed.*

Perry v. Huffman Automobile Co.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: COMMUTATION. In entering into an agreement under the workmen's compensation act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. Laws 1917, ch. 85, sec. 16, amending section 3681, Rev. St. 1913.

2. ———: ———: ——— In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of the court to protect without regard to the wishes of the parties.

3. ———: ———: ———. The workmen's compensation act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public, but as a general rule requires employers to pay injured employees compensation in small periodical payments at short intervals.

4. ———: ———: ———. Under the workmen's compensation act, in cases of death or permanent disability, commutation or payment in a lump sum by approved agreement is a departure from the general rule and should only be sanctioned upon the statutory terms relating to the exception.

5. ———: ———: ———. Under the workmen's compensation act the nature and the extent of the injury are material inquiries upon an application for the approval of an agreed commutation from periodical payments to a lump sum for a permanent disability.

6. ———: ———: ———: PROCEDURE. The authority to approve a commutation from periodical payments to the payment of a gross sum for a permanent disability has been committed by the workmen's compensation act to the district court, but the settlement should be submitted to the compensation commissioner for his approval before the district court is asked to approve the commutation.

ROSE, J.

This is a proceeding under the workmen's compensation act. Plaintiff fell from a ladder June 20, 1918, and broke two bones in his left ankle, while performing the duties of a carpenter in the employ of defendant for $18 a week. The injury resulted in "a permanent partial loss" of the use of a foot within the meaning of the stat-

ute and plaintiff is entitled to compensation accordingly. Laws 1917, ch. 85, sec. 7. Defendant paid and plaintiff received regular weekly payments of $12 for 12 weeks, amounting to $144. Afterward the parties agreed to settle plaintiff's entire claim for the lump sum of $500. This settlement was presented to the district court for Douglas county and it was approved July 10, 1919. Defendant was directed to pay plaintiff the unpaid balance of $356 in full satisfaction of the latter's claim for compensation and that sum was so paid and accepted. At the same term of court, August 30, 1919, plaintiff filed a motion to vacate the settlement on the grounds, among others, that he did not receive the full compensation allowed by law, that the amount due him had not been determined by either the compensation commissioner or the district court, and that the commutation as approved was unauthorized. Upon a hearing of this motion on its merits it was overruled October 4, 1919. Plaintiff appealed. The review here resulted in the opinion that the district court did not err in overruling plaintiff's motion to vacate the judgment approving the settlement. *Perry v. Huffman Automobile Co., ante,* p. 211. A rehearing was granted and the case has been reargued.

Did the district court err in overruling the motion to vacate the settlement? In approving the agreement, did the trial court require the parties to comply with the statute under which both sought relief or protection?

In entering into an agreement to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make settlements at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. Laws 1917, ch. 85, sec. 16, amending section 3681, Rev. St. 1913.

In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of

the court to protect without regard to the wishes of the parties. The act creates new remedies and new liabilities. The manner in which it operates is found in the legislation itself. Its remedies, if invoked, interfere more or less with the freedom of contract and must be applied on the terms granted.

The workmen's compensation act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public. To prevent injured employees and dependents from squandering or losing their means of support, the legislature, on grounds of public policy, has adopted the system of requiring employers to pay compensation for injuries in small periodical payments at short intervals for a definite period.

Commutation or payment in a lump sum by approved agreement of the parties is a departure from the general rule and should only be sanctioned upon compliance with the statutory terms relating to the exception.

Facts disclosing compliance with the provisions governing the exception are subjects of inquiry on the hearing of every application for the approval of a lump sum in lieu of periodical payments. In the present case some of the facts essential to a compliance with the exception were not before the trial court when the settlement was approved. Evidence from which the nature and the extent of the injury could be determined was wanting. The settlement had not been presented to or approved by the compensation commissioner. Without accurate knowledge of the nature and the extent of the injury the compensation to which plaintiff is entitled is unknown, and compensation based on the injury is a material factor in the approval of an agreement for commutation. "The probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests," is the statutory method of determining the lump sum payable in lieu of periodical payments. Laws 1917, ch. 85, sec. 16. There

is no other standard for commutation. Any method reducing the compensation thus ascertained is unauthorized as a basis for the approval of a settlement. The workmen's compensation act, as amended in 1917, contains the following provisions:

"The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court; provided, that where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests." Laws 1917, ch. 85, sec. 16.

"All disputed claims for compensation or for benefits under this article must be submitted to the compensation commissioner." Laws 1917, ch. 85, sec. 13.

"Reports of accidents and settlements shall be made in form and manner as prescribed and directed by the compensation commissioner." Laws 1917, ch. 85, sec. 20.

The compensation commissioner is charged with the duty of executing all provisions of the act. Laws 1917, ch. 85, sec. 27. Every claim for benefits may be presented to the compensation commissioner for adjudication and award. Laws 1917, ch. 85, sec. 29. A copy of all settlements must be filed with the compensation commissioner. Laws 1917, ch. 85, sec. 12.

While the authority to approve a lump sum for a permanent disability has been committed to the district court, it seems to have been the intention of the legislature, as disclosed by the entire act, to require the parties to submit their agreement to the compensation commissioner before asking the district court to approve the commutation.

In the commutation of plaintiff's compensation, therefore, there was a failure to comply with the workmen's compensation act. The amounts of compensation payable periodically under the law had not been ascertained. The settlement had not been presented to the compensation commissioner for examination and approval. The nature and the extent of the injury had not been shown. It follows that there was error in the overruling of the motion to vacate the judgment approving the settlement. In the further proceedings, however, defendant should be credited with the payments already made. The former opinion is modified to conform to these views.

REVERSED AND REMANDED.

DEAN and DAY, JJ., not sitting.

WILLIAM F. WHEELER, APPELLEE, v. STANDARD ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED FEBRUARY 14, 1920. No. 20755.

1. **Insurance**: ACCIDENT INSURANCE: AMOUNT OF RECOVERY. The fact that the insured under an accident insurance policy occasionally or incidentally performs acts that pertain to an occupation that is classed by the insurer as more hazardous than the occupation named in the policy does not have the effect of reducing the amount of recovery in the event of injury.

2. ———: ———: CHANGE OF OCCUPATION: QUESTION FOR JURY. The question as to whether the insured claiming indemnity under an accident insurance policy has changed his occupation is ordinarily a question of fact to be determined by the jury.

3. ———: ACCIDENT: NOTICE. A beneficiary under an accident insurance policy, in respect of partial disability, served notice on the insurance company that he was partially disabled for sixteen weeks; that at the time of filing his claim the partial disability continued; that an injured limb then caused swelling and pain when he attempted to walk. *Held*, that the notice was sufficient, and that the company was liable for the ten-week period of partial disability that prevailed subsequent to the filing of the original claim, and that was pleaded in plaintiff's petition.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

F. P. Olmstead, for appellant.

Stiner & Boslaugh, contra.

DEAN, J.

For personal injuries sustained from an accident alleged to come within the terms of an accident insurance policy, plaintiff recovered judgment for $1,202.18, and defendant appealed.

Defendant says only these questions are to be determined: "First. In what hazard did Mr. Wheeler receive his injury? Second. How many weeks is he entitled to receive pay for partial disability?"

Defendant admits liability in the sum of $488.50, and argues that the verdict is excessive in all over that sum, for the reason that plaintiff was injured while acting as a "drover, not tending cattle in transit," an occupation classed by the company as more hazardous than that described in the policy as plaintiff's occupation, which is therein described as follows: "Money loaner, insurance and general broker—does some traveling." The injury was sustained while plaintiff was assisting in driving a herd of cattle owned by him to a railroad station for shipment to his ranch. In attempting to mount his horse, the animal lunged forward and, striking him, caused plaintiff to sustain a compound fracture of his right leg.

Section 7 of the policy provides: "If the insured is injured in any occupation classed by the company as more hazardous than that described in the warranties hereinafter contained (excepting ordinary duties about his residence), the company's liability shall be for only such proportion of the principal sum or other indemnity as the premium paid will purchase at the rate fixed by the company for such increased hazard."

Under the decisions we do not think that plaintiff's occupation was changed at the time of the accident as

argued by defendant. He was assisting in driving his own cattle to a railroad station for shipment to a ranch owned by him. This was not a change of occupation, but was merely incidental to his occupation. The fact that the insured occasionally or incidentally performs acts that pertain to an occupation that is classed by the insurer as more hazardous than the occupation named in the policy does not have the effect of reducing the amount of recovery in the event of injury. *Simmons v. Western Travelers Accident Ass'n*, 79 Neb. 20; *Gotfredson v. German Commercial Accident Co.*, 218 Fed. 582, L. R. A. 1915D, 312. Whether a change in occupation was made and another adopted is ordinarily a question of fact for determination by the jury. *Taylor v. Illinois Commercial Men's Ass'n*, 84 Neb. 799, 805. In the present case it was shown that plaintiff on one occasion assisted in driving his own cattle on the highway, and that the injury was sustained at the time. To hold that this constituted a change from his usual occupation to one more hazardous would be a construction of the policy that would not be in harmony with the weight of authority. Defendant relies on section 3240, Rev. St. 1913, but that act can have no bearing on the facts before us, because it was enacted after the date of the policy in question.

It is argued that the verdict, based as it is on 33 weeks of total disability and 26 weeks of partial disability, is excessive, in that the claim as filed with the company alleged only 16 weeks of partial disability, and that plaintiff, having filed no subsequent claim for the additional 10 weeks, was therefore not entitled to payment for the additional time as alleged in his petition. It may be noted, however, that plaintiff in his original claim stated that the partial disability was then present and apparently continuous, and that his injured limb then caused swelling and pain when he attempted to walk. That partial disability prevailed for 10 weeks subsequent to the filing of the original claim sufficiently appears, and we think

the company was sufficiently notified of its existence. We do not think the court erred in admitting proof to sustain the allegations of plaintiff's petition in the respect complained of.

Finding no reversible error, the judgment is

AFFIRMED.

LETTON and DAY, JJ., not sitting.

ANTON TRAMP V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1920. No. 21266.

1. **Criminal Law: CONFESSION.** A confession induced by fear or promises, and not voluntarily made, is not admissible in evidence.
2. ———: ———: **ADMISSION: PREJUDICIAL ERROR.** Where a statement, in the nature of a confession, is offered in evidence by the state in a criminal prosecution, it may be prejudicial error for the trial judge to refuse the request of defendant to hear the testimony of his witnesses tending to prove the statement was procured under fear of great bodily harm by a mob, before receiving such statement in evidence and allowing it to be read to the jury.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Reversed.*

R. J. Millard and *F. L. Bollen,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

ALDRICH, J.

Prosecution for violation of chapter 187, Laws 1917. Complaint was filed in county court of Knox county charging, among other things, that on the 18th of July, 1918, defendant gave and furnished intoxicating liquors to another. This act was a second offense; the first offense having been committed in Dixon county. There were three counts in the information. The jury acquitted defendant on the second and third counts, finding him guilty only on the first count.

Several assignments of error are set out in defendant's brief. It is necessary to consider but two: First, was there proper and sufficient foundation laid for introduction in evidence of a written statement or confession of defendant?

The court permitted introduction of the statement of defendant over his objection and offer to prove that this statement was made under duress while defendant was surrounded by an angry crowd making threats and talking of producing a rope, and while defendant was in fear of great bodily harm. The admission in evidence of a confession or statement made under these circumstances constitutes reversible error.

After permitting this statement to go before the jury, its weight and certain impressions would be lodged with the jurors, and the burden would, in effect, be upon defendant to show that the confession was made under threats of violence and in the presence of a crowd of men who were acting like members of a mob. This is prejudicial error.

The defendant signed and acknowledged the statement in the presence of the county attorney with the crowd in close proximity. It was an abuse of discretion for the trial court to allow the jury to receive this evidence without first giving defendant opportunity to prove under what conditions and circumstances the statement was obtained. It was the duty of the trial judge to pass upon the sufficiency of the foundation. The only theory on which such a statement is permissible of being introduced is where given voluntarily, without fear of punishment, or hope of reward, and free from violence and any possible bodily harm.

The verdict of the jury is reversed, and the cause is remanded for further proceedings.

REVERSED.

ROSE, J., dissents.

LETTON and DAY, JJ., not sitting.

CORNISH, J., concurring.

While it is the general rule that, after the state has laid a foundation for the introduction of a confession, the defendant, upon request, will be permitted to cross-examine the witness and introduce evidence to show that the confession was not voluntary, before the confession will be permitted to go to the jury, it is not to be understood that in this opinion we are holding that in all cases it would be prejudicial error for the trial court to refuse to first permit defendant's evidence. The trial judge has a certain discretion in determining the order of the testimony, which, however, may be abused.

When the evidence, touching the voluntary character of the confession, is not clear but conflicting, then such evidence, together with evidence showing the confession, should be submitted to the jury under proper instructions to consider or not consider it, in accordance with the law given them bearing upon the voluntary character of a confession.

CHRISTIAN SIMONSEN, APPELLANT, V. SAMUEL A. SWENSON, APPELLEE.

FILED FEBRUARY 14, 1920. No. 20777.

1. **Physicians:** PRIVILEGED COMMUNICATIONS. The information given to a physician by his patient, though confidential, is given subject to the understanding, conclusively presumed in law, that, if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it may be transmitted to others unless the danger of transmission is disclosed to them, the physician is then privileged to make so much of a disclosure to such persons as is reasonable and necessary to prevent the spread of the disease.

2. ——: ——: LIABILITY. Where a physician makes such a disclosure, believing that a disclosure was necessary to prevent the spread of the disease, and when the disclosure is made to one who, it is reasonable to believe, might otherwise be exposed, and when the physician acts in entire good faith, with reasonable grounds

for his diagnosis and without malice, he cannot be held liable in damages by his patient, even though he is mistaken in his diagnosis and has reported that his patient was afflicted with a disease which in fact he did not have.

APPEAL from the district court for Burt county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Frank V. Lawson and *Gray & Brumbaugh,* for appellant.

Alvin F. Johnson, contra.

FLANSBURG, C.

Action for damages for alleged breach of duty arising from confidential relationship between defendant, who is a physician, and plaintiff, who was his patient. At the close of the testimony the court directed a verdict in favor of the defendant, and plaintiff appeals.

Plaintiff, with other employees of a telephone company, was working at Oakland, Nebraska. He was a stranger at the place, and was stopping with these men at a small hotel operated by a Mrs. Bristol. He became afflicted with sores on his body, and went to the defendant, a practicing physician at that place, who took the history of plaintiff's trouble, gave him a physical examination, and informed him that he believed his disease to be syphilis. He further stated, however, that it was impossible to be positive without making certain Wasserman tests, for which he had no equipment.

Defendant was the physician of the Bristol family, and acted as their hotel doctor when one was needed. He told plaintiff that there would be much danger of his communicating the disease to others in the hotel if he remained there, and requested that he leave the next day, which plaintiff promised to do.

On the following day the defendant, while making a professional call upon Mr. Bristol, who was ill, learned that plaintiff had not moved from the hotel. He therefore warned Mrs. Bristol that he thought plaintiff was afflicted with a "contagious disease," and for her to be

careful, to disinfect his bed clothing, and to wash her hands in alcohol afterwards. Mrs. Bristol, acting upon this warning, placed all of plaintiff's belongings in the hallway, and fumigated his room. Plaintiff was forced to leave.

The testimony of the physicians disclosed that this particular disease is very readily transmitted in its early stages, and could be carried through drinking cups, eating utensils, and other articles handled or used by the diseased person.

After leaving Oakland, plaintiff consulted another physician. He gave to this physician a history, showing that he might have been exposed a few weeks before to such a disease, and was given a physical examination by this doctor. One Wasserman test was made, which proved negative. That test alone, however, this physician testified, proved nothing, since the presence or absence of such disease could not be positively known without extended tests. These had not been made, and this doctor said that it was impossible for him to say whether the plaintiff had or had not the disease when he examined him. He went on further to say that the symptoms and information upon which the defendant acted were, however, reasonably sufficient to cause the defendant to believe as he did.

The testimony is practically without conflict; plaintiff having called the defendant to testify as his own witness.

The plaintiff contends that, having shown the relationship of physician and patient, the law prohibits absolutely a disclosure of any confidential communication, at any time or under any circumstances, and that a breach of this duty of secrecy on the part of the physician gives rise to a cause of action in damages in favor of the patient.

At common law there was no privilege as to communications between physician and patient, and this rule still prevails when not changed by statute. *Thrasher v. State*, 92 Neb. 110; 40 Cyc. 2381.

Section 7898, Rev. St. 1913, provides that a physician shall not be allowed to disclose, on the witness-stand, any confidential communication intrusted to him in his professional capacity. The disclosure of confidences in this case was not by the defendant as a sworn witness, and this statute, therefore, obviously does not apply and has no bearing upon this case.

There is a further provision of our statute, however (Rev. St. 1913, section 2721), providing that no physician shall practice medicine without a license from the board of health, and that such a license may be revoked when a physician is found guilty of "unprofessional or dishonorable conduct." Among the acts of such misconduct, defined by the statute, is the "betrayal of a professional secret to the detriment of a patient."

By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy. The relation of physician and patient is necessarily a highly confidential one. It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong.

Is such a rule of secrecy, then, subject to any qualifications or exceptions?

The doctor's duty does not necessarily end with the patient, for, on the other hand, the malady of his patient may be such that a duty may be owing to the public and, in some cases, to other particular individuals. Recognition of that fact is given by the statutes in this state which delegate power to the state board of health, and to municipalities generally, to require reports of, and

provide rules of quarantine for, diseases which are contagious and dangerous. An ordinance in Omaha enacted under such power, providing quarantine of communicable venereal diseases, has been sustained by our court in *Brown v. Manning,* 103 Neb. 540.

When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient, to the extent only of what is necessary to a strict compliance with the statute on his part, and when his report is made in the manner prescribed by law, he of course has committed no breach of duty toward his patient and has betrayed no confidence, and no liability could result.

Can the same privilege be extended to him in any instance in the absence of an express legal enactment imposing upon him a strict duty to report?

The statute making the "betrayal of a professional secret" misconduct on the part of a physician is in derogation of the common law and should be strictly construed. We believe the word "betrayal" is used to signify a *wrongful* disclosure of a professional secret in violation of the trust imposed by the patient.

No patient can expect that, if his malady is found to be of a dangerously contagious nature, he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted. The information given to a physician by his patient, though confidential, must, it seems to us, be given and received subject to the qualification that, if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should, in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease. A disclosure in such case would, it follows, not be a betrayal of the confidence of the patient, since the patient

must know, when he imparts the information or subjects himself to the examination, that, in the exception stated, his disease may be disclosed.

In order that such a privilege of making a disclosure be available to a physician, however, he must have had ordinary skill and learning of a physician, and must have exercised ordinary diligence and care in making his diagnosis; otherwise he could be subjected to an action for negligence in making a wrongful report. *Harriott v. Plimpton,* 166 Mass. 585.

In making such disclosure a physician must also be governed by the rules as to qualifiedly privileged communications in slander and libel cases. He must prove that a disclosure was necessary to prevent spread of disease, that the communication was to one, who, it was reasonable to suppose, might otherwise be exposed, and that he himself acted in entire good faith, with reasonable grounds for his diagnosis and without malice.

The plaintiff cites the case of *Smith v. Driscoll,* 94 Wash. 441, and contends that this case holds that any disclosure by a physician of a confidential communication from his patient is actionable. That was a case to hold a physician liable for divulging professional secrets in his testimony in court, and when his statements were claimed to be not relevant nor pertinent to the issues involved in the case. The court held the petition against the physician demurrable under the law in that state, for the reason that it contained no allegations that the matter of which he testified was irrelevant and not pertinent to the issues of the case. In a dictum the court stated: "Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say, it will be assumed that, for so palpable a wrong, the law provides a remedy."

The instant case is a novel one. No cases bearing directly upon the question have been cited by counsel, and our search has been unsuccessful.

It appears to us that the facts disclosed by the record in this case show that the occasion was privileged, that the defendant had reasonable grounds for his belief, that he made no further disclosure than was reasonably necessary under the circumstances, and that he acted in good faith and without malice.

Had the plaintiff put in issue any of these facts, the case should have gone to the jury, but, as we take it, the testimony introduced raises no issues upon those questions.

For the reasons given, we recommend the case be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed and this opinion adopted by and made the opinion of the court.

AFFIRMED.

FIRST NATIONAL BANK OF UNIVERSITY PLACE, APPELLEE, V. GEORGE M. GATES ET AL., APPELLANTS.

FILED FEBRUARY 28, 1920. No. 20795.

Appeal: SUPERSEDEAS BOND. The time within which to file a supersedeas bond under section 8189, Rev. St. 1913, for an appeal to the supreme court in a law action begins to run, not from the entry of the judgment, but from the overruling of the motion for a new trial.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson, for appellants.

Hainer, Craft & Lane, contra.

MORRISSEY, C. J.

The question before us is whether, under section 8189, Rev. St. 1913, a party appealing to the supreme court

from a judgment in a law action, in order to supersede the judgment, must file a supersedeas bond within 20 days after the entry of the judgment, or whether it is sufficient to file such bond within 20 days after the overruling of the motion for a new trial.

Section 8189, Rev. St. 1913, provides that an appeal shall not operate as a supersedeas in any case, unless the appellant executes a proper bond "within twenty days next after the rendition of such judgment or decree, or the making of such final order." A judgment or decree in an equity case may be treated as final, so as to give a right of appeal, immediately upon its rendition, but in a law action the character of finality which a judgment must possess in order to be reviewable in this court does not attach until the overruling of a motion for a new trial. If the time for filing a supersedeas bond begins to run from the day the judgment is entered, it might operate so as to require the execution of this instrument while the motion for a new trial was still pending, while the judgment was not yet subject to review by this court, and while it was still uncertain whether an appeal would be necessary. Such a situation was not intended by the legislature. The time does not begin to run until the motion for a new trial is overruled.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

GRACE HANNA, APPELLEE, V. THOMAS HANNA, APPELLANT.

FILED FEBRUARY 28, 1920. No. 20710.

1. **Trial**: INSTRUCTIONS: STATEMENT OF ISSUES. In stating issues to the jury, it is error, which may be prejudicial, for the trial court to include pleas of which there is no proof, or to adopt the allegations of a petition in which plaintiff departed from the rules of pleading and inserted evidence, conclusions and arguments.

2. **Husband and Wife**: ALIENATION: INSTRUCTION. In an action by a wife, for the alienation of her husband's affections, it is error to

instruct the jury that "the wrong of the one who succeeds in withdrawing the husband's affection from the wife is almost impossible of measurement."

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Reversed.*

H. M. Sinclair and *W. A. Stewart,* for appellant.

Cook & Cook and *Fred A. Nye, contra.*

ROSE, J.

Grace Hanna, plaintiff, sued Thomas Hanna, defendant, to recover $50,000 for alienating the affections of her husband, David W. Hanna, a son of defendant. From a judgment on a verdict in favor of plaintiff for $14,000, defendant has appealed.

In the assigments of error the trial court's statement of the issues to the jury and an instruction on damages are assailed as erroneous and prejudicial. The determination of these questions requires a synopsis of plaintiff's case and of the defense interposed.

Plaintiff and David W. Hanna were married October 14, 1914, and for several weeks thereafter lived with defendant and his family in their home on their farm in Dawson county. In the spring of 1915 plaintiff and her husband moved to the latter's farm about a mile and a half away, where they resided until they were separated September 19, 1916. According to the petition, defendant, beginning soon after the marriage of plaintiff, made uncomplimentary comparisons between her and former sweethearts of her husband; meddled in her private affairs; told neighbors she was not adapted to farm life; accused her of gadding when she should have been at home at work; charged her with neglecting her duties as a wife; applied to her vulgar and profane epithets; threatened to assault her with his fists; advised her husband to leave her and thus alienated his affections. The petition shows on its face, however, that the affections of plaintiff's husband were not alienated from her before the date of their separation—September 19, 1916. Refer-

ring to that date she pleads: "Plaintiff and her husband were living together as husband and wife at their home on his land in Dawson county; that their demeanor toward each other was kind and affectionate, so that the plaintiff had no thought of any separation between them." Plaintiff testified to many of the incidents pleaded in her petition, and in giving her version of what occurred on the date of their separation, among other things, said, in substance: Defendant drove to their home in the forenoon and was sitting in his buggy talking to her husband when she approached them. Defendant in anger and malice, in presence of her husband, called her vulgar names; addressed her in violent and profane language; told her she needed a horse-whipping; wanted to know what she meant running around the country spending her husband's money; declared she couldn't hypnotize defendant; warned her husband not to let her hypnotize him; called attention to the glitter of her eyes; told her husband to come away from her, and threatened to assault her with his fists. Plaintiff also testified that this was followed by her husband saying to her, "Well, Grace, I guess we will have to quit," and by his leaving her.

The language and conduct imputed to defendant were denied in an answer pleading that his son David W. Hanna, soon after his marriage to plaintiff, became afflicted with an incurable tumor on his brain, resulting in total blindness and requiring attention, care and nursing, which plaintiff failed to provide; that defendant objected to her neglect, and without avail entreated her to give her husband proper attention and care in his illness; that in consequence of plaintiff's neglect her husband voluntarily came to his father's house for necessary attention, care and nursing; that plaintiff's husband often complained to his father of the neglect and ill-treatment of his wife, of her absence from home, of her lack of interest in their farm life, and of kindred wrongs; that on these matters the son sought his father's advice,

which, in every instance, based on the father's experience and judgment, without malice, was sincerely and honestly given for what defendant believed to be for the best interests of his son and plaintiff. The testimony on behalf of defendant tended to establish the defenses pleaded. His story of what occurred at the home of his son September 19, 1916, differed from that of his daughter-in-law. According to his version, he called to notify his son that he had discovered cows in his son's cornfield and to assist him in getting them out. While conversing with his son, the cows at the time being in danger from eating green corn and the crop being damaged by them, plaintiff, in attire that attracted the attention of defendant, came out of the house to depart in an automobile without her husband. In testifying, defendant denied the misconduct and language imputed to him by plaintiff on this occasion. The evidence in his behalf tends to show that he left plaintiff and her husband alone; that in an automobile she left her husband a few minutes later, and did not return for a week or ten days, and that in the meantime her husband voluntarily went to defendant's home — a proper refuge for him in his illness under the circumstances.

In the sensitive situation indicated by this outline of the pleadings and the proofs, the trial court resorted to the petition of plaintiff in stating to the jury the questions at issue. Two petitions had been filed, and in both plaintiff had departed from the statutory rule requiring "a statement of the facts constituting the cause of action in ordinary and concise language," and had inserted evidence, conclusions and arguments. Rev. St. 1913, sec. 7664. In the trial court's attempt to summarize the petition in an instruction, the vice in plaintiff's pleading reached the jury. In this manner, at least one allegation of which there was no proof was read to the jury from the bench.

The error in stating the issues to the jury was followed by another error in an instruction that "the wrong of

the one who succeeds in withdrawing the husband's affection from the wife is almost impossible of measurement." The law is that only such compensatory damages as are shown by the evidence to be the probable, direct and approximate consequence of the wrong pleaded are recoverable. The tendency of the instruction was to exaggerate in the minds of the jury both the wrong pleaded and the resulting damages. For these errors, which on the record presented are obviously prejudicial to defendant, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

DAY, J., not sitting.

JOHN NUGENT v. STATE OF NEBRASKA.

FILED FEBRUARY 28, 1920. No. 21268.

1. **Criminal Law:** CARRYING CONCEALED WEAPONS: INSTRUCTION. Section 8833, Rev. St. 1913, denounces as a crime the act of one who "shall carry a weapon or weapons concealed on or about his person," etc. The trial judge instructed the jury that the act must have been done "knowingly and intentionally." *Held*, not error in failing to instruct that criminal or felonious intent must be shown.

2. ———: ———: MITIGATION. One charged with carrying concealed weapons, contrary to law, may prove, in mitigation of punishment, the circumstances under which such weapon was carried.

ERROR to the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

C. H. Hendrickson and *R. J. Millard*, for plaintiff in error.

Clarence A. Davis, Attorney General, John B. Barnes and *Fred S. Berry, contra.*

CORNISH, J.

Defendant (plaintiff in error) was convicted of carrying concealed weapons and sentenced to two years in the penitentiary.

The court instructed the jury that the carrying of concealed weapons must have been done "knowingly and intentionally." The defendant requested, and the court refused, an instruction that it must have been done "wilfully and feloniously." The statute reads: "Whoever shall carry a weapon or weapons concealed on or about his person," etc. Rev. St. 1913, sec. 8833. The punishment prescribed is a fine of not exceeding $1,000 or imprisonment for not exceeding two years.

The question of the intent required in such a case is a new one in this state. The decisions of other states are divided. Some hold that criminal intent must be shown; others, that the intent is immaterial; that if one has a weapon concealed on his person he is guilty, regardless of the purpose for which he carried the weapon. The main purpose of the statute is not only to prevent the carrying of deadly weapons for use, but to prevent the carrying of them at all, because of the opportunity and temptation to use them which arise from concealment. 8 R. C. L. p. 288, sec. 309.

We are of opinion that the trial court's instruction was right. Of course, the presumption is that the legislature would hardly intend to punish, as for a felony, an act which was innocent of criminal intent. This is indicated by the punishment prescribed. The circumstances under which a concealed weapon is carried should be permitted in evidence, so that, if a case should arise where there is an absence of criminal intent, the punishment may be mitigated accordingly.

It is urged that the sentence in this case was excessive. This view is not sustained by evidence sufficiently convincing to incline us to disturb the judgment of the trial court. Apparently the defendant was somewhat defiant of the law and the authorities, and carried the revolver under circumstances such as sometimes result in shooting affrays and death.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

KATHERYN LAUGHLIN ET AL., APPELLEES, V. EDITH L. GARDINER ET AL., APPELLANTS.

FILED FEBRUARY 28, 1920. No. 20633.

1. **Homestead**: CONVEYANCE. Where a wife with knowledge of the material facts, and in the absence of fraud, voluntarily joins her husband in the conveyance of a homestead, she is thereafter estopped from asserting any right, title or interest therein.
2. ———: ———: LIEN. When real estate is conveyed to a wife, or to another in trust for her, in exchange for a deed to a homestead in which the wife joins, it is not error for the district court to render a judgment holding the real estate so conveyed to the wife as security for a judgment lien against such homestead that was fraudulently concealed from the vendees by the vendors at the time of the exchange of the properties.
3. **Mortgages**: NOTICE. Where a grantor remains in possession of real estate after execution of the deed therefor, one who loans money on such real estate and takes a mortgage lien as security is charged with notice of the right, title or interest of such occupant in the property. *Smith v. Myers*, 56 Neb. 503.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and *Courtright, Sidner & Lee*, for appellants.

John A. Miller, Warren Pratt and *N. P. McDonald*, *contra.*

DEAN, J.

Katheryn and Margaret Laughlin are sisters. They began this action against William J. and Edith L. Gardiner, his wife, Violet E. Gardiner, a daughter, and Charles K. Davies to have certain land, conveyed to them by Gardiner and wife in a sale and exchange of real estate, released from a judgment lien in favor of Davies, but owned by the Exchange Bank of Gibbon, and to have the amount of such judgment lien paid by William J. Gardiner, or, if he fails to pay, that it be paid from the pro-

ceeds of the sale of certain real estate obtained from plaintiffs by Gardiner and wife in the exchange of property. The defendant Nebraska State Building & Loan Association held a first mortgage lien, executed by Violet E. Gardiner, on real estate lately owned by plaintiffs, and now in their possession, which mortgage lien plaintiffs allege is subject and inferior to their rights in the mortgaged property. The decree protecting, as it does, the interests of Davies and the Exchange Bank of Gibbon, they, as well as plaintiffs, ask for affirmance of the judgment. Plaintiffs prevailed, and defendant Edith L. Gardiner, claiming a homestead interest in the land conveyed to plaintiffs, and the defendant loan association, claiming a first mortgage lien on the property conveyed to Violet E. Gardiner, separately appealed.

On and before February 22, 1917, defendant William J. Gardiner owned an 80-acre farm in Buffalo county. On that date he contracted in writing with plaintiffs for a sale and exchange of real estate, wherein he agreed to convey to them his farm by warranty deed, free of incumbrance, except a $2,800 mortgage. The contract also provided that plaintiffs should give $8,000 for the farm in manner following, namely, $2,200 in cash, a house and lot in Kearney, valued at $3,000, and assume payment of the $2,800 mortgage. To fulfil their part of the agreement, plaintiffs, as soon as the contract was executed, borrowed $5,000, giving a mortgage on the 80 acres as security, and used the money to pay the $2,800 mortgage and a $1,200 mortgage on the eighty that was not referred to in the contract. The remainder of the $5,000 was paid to Gardiner. Plaintiffs then conveyed by deed of warranty to the defendant Violet E. Gardiner, at the request of Mrs. Gardiner and her husband, the house and lot referred to in the contract. This completed the payment of the purchase price of the farm. Thereupon Gardiner and wife delivered to plaintiffs on April 28, 1917, a deed conveying the 80-acre tract to plaintiffs jointly. The deed to the farm was signed and acknowledged by

Gardiner and wife on April 2, 1917. On delivery of this deed to plaintiffs, they entered into, and have ever since remained in, possession of the farm. A few days after taking possession of the farm Katheryn Laughlin was informed by Davies that he owned a judgment lien against the 80-acre tract approximating $1,550 that was obtained in a suit against William J. Gardiner. This was the first intimation that plaintiffs, or either of them, ever had of the existence of the Davies lien.

Respecting the Davies judgment lien, counsel for Mrs. Gardiner makes this statement in his brief that seems fairly to reflect the facts: "It appears from the petition in that case that Davies signed a note (for $1,550) as surety for William J. Gardiner as part of the purchase price of a butcher's shop in Gibbon, and Gardiner had agreed to give Davies a mortgage on the land in question to indemnify him therefor, and the suit was for specific performance of that contract. Into that action was injected a claim by Davies for $80 as commission for making the trade. And also a claim of Halloway & Ross for $260.50 on a note given by Gardiner in the deal. This mongrel lawsuit was tried to the court and resulted in a decree for specific performance and in two money judgments at law; one in favor of Davies for $51.50, the other in favor of Halloway & Ross for $269.58. The costs of the action in the amount of $100.55 were taxed against Gardiner. The law judgments were entered on the judgment docket and properly indexed. The equity decree was not entered on the judgment docket, nor was a copy of this decree filed in the office of the register of deeds. An execution was issued on the law judgments, which was paid and so noted on the record. The decree * * * contains the usual provision that, in the event that the mortgage is not executed and delivered within a time certain, the decree (shall) stand in its stead. There was no mortgage executed. So it is the decree or nothing. The important point in so far as these proceedings affect the present controversy is the wife, appellant Edith L. Gardiner, was not a party to that action."

As stated by counsel, Mrs. Gardiner was not a party, but she was present at the trial, was a witness in the Davies case, and had knowledge of the Davies lien. It appears too, that a *lis pendens* was filed in the recorder's office when the Davies suit was begun.

It does not clearly appear that the 80-acre tract was a homestead when the Davies judgment was obtained. But it partook of the homestead character when the exchange contract was signed by plaintiffs and William J. Gardiner. It is argued that because Mrs. Gardiner did not join her husband in signing the exchange contract it is therefore void because the land is a homestead. Section 3079, Rev. St. 1913, is cited by Mrs. Gardiner's counsel. The act provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Mrs. Gardiner, having joined her husband in the execution and acknowledgment of the deed, came within the meaning of the act.

These material facts, among others, plainly appear. Mrs. Gardiner on direct examination testified that the terms of the proposed exchange of the properties were talked over between herself and husband, and that it was agreed between them that the Laughlin town property was to be conveyed to her if she would join in the deed to the farm. It is not contended, nor even suggested, that plaintiffs knew about this agreement between Gardiner and his wife. Mrs. Gardiner testified that in the Laughlin deed to the town property, by her own direction, her daughter Violet was named as grantee so that, as she expressed it, Violet might take care of it for her. Neither fraud nor deception appears to have been employed to induce Mrs. Gardiner to join in the conveyance. We conclude that a valid exchange of the respective properties was consummated by the parties and that both Gardiner and his wife, by their deed of conveyance, parted with all their right, title and interest in the 80-acre tract.

Counsel for Mrs. Gardiner insists that the town property cannot be lawfully charged with the Davies lien, as decreed by the district court, because it is solely her husband's debt and because the town property does not belong to him but is her property. We do not think the argument is tenable. Mrs. Gardiner, with full knowledge of the material facts, joined her husband in the execution and acknowledgment of the warranty deed that conveyed title to the farm to the Laughlins, and as consideration therefor the title to the town property was to be conveyed to her, but instead, and by her own express request, the record title was not placed in her name but in the name of her daughter Violet, apparently in trust for her. Except that she held the town property for her mother, Violet had no interest in it whatever.

Any defect in the title to the farm must of course be made good by the grantors to the grantees, and in view of the consideration, namely, the town property, that Mrs. Gardiner as a grantor received for joining in the deed, such property is therefore fairly chargeable with the Davies lien to such extent as may be necessary to pay it off and release the farm therefrom in the absence of payment by her husband.

It is argued that Mrs. Gardiner still owns a marital interest in the 80 acres of farm land. But when she joined her husband in the deed this interest was of course extinguished.

Defendant Mrs. Gardiner argues that plaintiffs' remedy is a rescission of the contract. On this point the court made the following findings that are amply sustained by the record, namely: "That plaintiffs are entitled to keep and retain possession of said lot until the lien of the decree in favor of Charles K. Davies is satisfied and discharged, that the consideration paid by the plaintiffs to the defendants for said land has been paid out and expended by them; that the mortgages on the land which were executed thereon by said Gardiner and wife have been paid and satisfied, and another mortgage has been

placed thereon by the plaintiffs without their knowledge of the Davies lien, and the house and lot has been incumbered with a mortgage for $1,500 to the Nebraska State Building & Loan Association, and the money received therefor has been expended by them, so that said mortgage cannot be satisfied by the Gardiners; that said William J. Gardiner is insolvent and Edith L. Gardiner has no property except her interest in said lot; that the situation of the parties has so changed that rescission of said sale is impossible; the parties cannot be placed in *statu quo,* and actual rescission is not necessary to do complete justice between the parties; that the plaintiffs have a lien on said lot to the amount and extent of the said lien in favor of Charles K. Davies on said land, and are entitled to a foreclosure thereof to satisfy the said Davies lien on the land."

The defendant loan company appears in the record as claimant of a first mortgage lien on the town property and contends that its lien is prior and superior to the Davies lien. It argues that the district court erred in holding to the contrary. It seems that on the same day that the Gardiners obtained the deed to the town property the company loaned to them $1,500 for which Violet Gardiner executed a note secured by a first mortgage. The loan was made in reliance on the Laughlin deed. But at the time that the mortgage was executed and the money was paid over to Violet Gardiner by the loan company, the Laughlins had not yet relinquished possession of the town property, and, to protect their interest, they were still in possession when this suit was tried.

On this feature of the case the court properly found: "That if the defendant William J. Gardiner shall fail for twenty days from the entry of this decree to pay to the Exchange Bank of Gibbon, Nebraska (owner of the Davies claim), the sum of $1,271.10 with interest thereon at 7 per cent. from this date, and procure a satisfaction of the decree and the *lis pendens* filed in the case of

Charles K. Davies v. William J. Gardiner in the district court of Buffalo County, Nebraska, together with the costs of this action, the interest of the defendants in lot 3 in block 16 of Ashland addition to Kearney, Nebraska, be and the same hereby is foreclosed, and said premises are ordered to be sold as upon execution and the proceeds of said sale shall be applied to the payment of the amount due to the Exchange Bank of Gibbon, Nebraska, or to the plaintiffs to reimburse them if they shall pay the same; the costs of this action and the remainder, if any, shall be paid to the Nebraska State Building & Loan Association to the extent of the amount due on its mortgage on said premises, and any surplus remaining shall be paid to the defendant Edith L. Gardiner."

The loan company now argues that the retention of possession by the Laughlins, of less than a day's duration, was not sufficient to notify it of any right, title or interest that they might have in the property recently conveyed. It contends that a vendor who has delivered his deed should thereafter be estopped from asserting an interest contrary to the terms of the conveyance, even though such vendor is yet in actual possession of the property conveyed.

Authorities from other jurisdictions are cited that seem to support its contention, but they do not appeal to us, in view of the fact that this jurisdiction for more than 30 years has been committed to the rule that a person who deals with the vendee of real estate is bound to take notice of any rights that the vendor in possession may have, even though such possession may continue after the execution and delivery of the deed. *Smith v. Myers*, 56 Neb. 503; *Hansen v. Berthelsen*, 19 Neb. 433. The rule is reasonable, and it does not appear to us that another should be substituted. It is plain in its requirement and is easily understood. Whether a vendor has relinquished possession and his vendee has acquired possession is a question that is not ordinarily difficult to determine. In the absence of fraud or of waiver, and in

view of our former decisions, we do not think that an arbitrary time limit should be fixed by the court in which a vendor, who is yet in actual possession of real estate conveyed by him, may be held to have relinquished possession. Such possession remains a question of fact. On this point we adhere to the rule announced in the *Smith* and *Hansen* cases cited herein.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

CORNISH, J., dissenting.

I had always supposed the law to be that when, in a trade of this sort, one of the parties discovers fraud or misrepresentation, he has at his election either of two remedies: He can disaffirm the contract and ask a rescission, or he may stand upon the contract and ask damages for the fraud or misrepresentation. Either of these remedies is supposed to be adequate, and they are inconsistent.

My associates agree with this rule as a general statement of the law, but insist that the rule laid down is not a violation of it. I hope it is not, because I think the rule is founded upon broad principles of justice. To hold that the party who claims fraud may stand upon the contract and yet refuse to perform upon his part by making delivery, that he can retain possession of both properties because of an alleged fraud, thereby depriving the other party of his right to a trial by jury upon the question of a fraud which he may deny, is an innovation upon ancient and settled practice. If, because of insolvency, or because rescission has become impossible, it becomes necessary, for the protection of the defrauded party, to retain both pieces of property, then such trust may be ordered in equity; but this would be in a suit where the defrauded party was endeavoring to be placed in *statu quo*. A condition would be that he offer to rescind. Damages for fraud cannot be assumed. He cannot create a right by

default upon his own part. *American Building & Loan Ass'n v. Rainbolt,* 48 Neb. 434.

The upshot of the decision is unjust. Gardiner's wife was the owner of a homestead. She had an interest in the 80 acres as his wife which was not subject, in this way at least, to the payment of her husband's debts. She would not convey her interest in the land until she was promised that the house and lot, for which it was in part traded, should be deeded to her. And this was done. The plaintiffs were bound to take notice of that. The contract between the plaintiffs and Mrs. Gardiner's husband, not signed by her, was a nullity. The result of our judgment is that Mrs. Gardiner's homestead right and interest in her husband's land are taken away from her to pay her husband's debts, contrary to the agreement which she made. True, she signed the deed, but is she not entitled to the consideration she was to receive?

The following opinion on motion for rehearing was filed June 7, 1920. *Former judgment of affirmance modified, and rehearing denied.*

PER CURIAM.

On application of the Nebraska State Building & Loan Association for rehearing. The brief of this appellant was not prepared in accordance with rule 12 (Supreme Court Rules, 94 Neb. XI), and one of the points attempted to be presented was overlooked in consequence of this.

On re-examination of the record in the light of the facts presented in the brief of *amicus curiæ,* the facts demand a modification of the opinion as to the priority of liens upon the town property.

On April 28, 1917, the agent for the Laughlins delivered the deed to the house and lot to Gardiner. On the same day Gardiner took the conveyance to the agent of the loan association, delivered the mortgage and received a check for the amount of the loan. At that time the Laughlins, who were in possession, had no knowledge

that Davies was claiming a lien upon the 80 acres of land they had procured from Gardiner. The settled law in this state is that possession of real estate is notice to an intending purchaser or mortgagee of whatever rights the person in possession then asserts. The association was therefore chargeable with notice of whatever claim of rights of the Laughlins inquiry made of them at that time would have disclosed. The evidence is undisputed that such an inquiry would have disclosed that they were then merely holding by sufferance, ready to yield possession at any time, and making no claim of any interest in the property. Their possession therefore was not notice of any infirmity in the title. The loan company was an innocent purchaser or mortgagee and their mortgage was recorded before the rendition of the decree creating a lien in favor of the Laughlins. The lien of the mortgagee was prior thereto.

The former judgment and opinion is therefore modified so as to declare the lien of the building and loan association prior to that of plaintiffs upon the premises involved.

REHEARING DENIED.

THOMAS DIXON, APPELLANT, V. BOONE COUNTY, APPELLEE.

FILED FEBRUARY 28, 1920. No. 20916.

Evidence examined, and *held* sufficient to sustain the decree of the district court.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

T. J. Doyle and *H. C. Vail,* for appellant.

W. J. Donahue, contra.

ALDRICH, J.

Plaintiff, appellant herein, commences this action in equity for damages and to enjoin the defendant from

maintaining a graded road along the southwest quarter and west half of the southeast quarter of section 20, township 20, range 5, in Boone county. Through this land the natural drainage is from north to south. Plaintiff owns 75 acres of flat level land north of this highway.

The county commissioners of Boone county built a public highway on this section line. It was necessary to make an embankment or grade about three feet high. To permit the natural flow of water passing over this level land, three bridges were built. The west bridge was 32 feet in length, and the center and east bridges 16 feet each. The west bridge was over the main channel provided by nature for the water coming from the north and flowing to the south. The court gave plaintiff judgment for $150, because of defendant's failure to keep the channel clear during times of high water, and refused a permanent injunction enjoining the maintaining of the grade across this valley. The surrounding country was comprised of rolling land, and this valley and channel acted as a natural drainage to the adjacent country. At times of heavy snow when the same thawed, this valley would be completely inundated, and the same would be true in time of flood or high water.

When this country was a raw prairie, the water flowed away quickly. This valley as far as the eye can perceive is a dead level, though the fall is about one foot to the mile. This means that naturally in the first stages of a flood the water drains off slowly. After it has reached a certain point, the low places or swales or slight depressions fill with water and stay so for weeks, until the same evaporates or drains off slowly by seepage. When the country was untouched by the plow, swift currents and rushing waters would cut deep channels or ravines much lower than the surrounding surface, and naturally flood waters would drain away. When the soil was farmed, these deep channels would wash full of dirt, grain shocks, fence posts, and other debris. Then the channels were filled. We believe from the record and discussions in

this case that some of the conditions plaintiff complains of existed prior to the construction of this grade. It seems clear that this graded road is a necessity to public needs, and the highway commissioners acted in the line of their duty when they built it. Since this valley and surrounding country are used for farming purposes there are entirely different conditions than when the whole country was a raw prairie.

It appears that this west bridge, which is across the main channel provided by nature as a drainage to this valley, would largely take care of this water if the bridge was properly constructed. The county commissioners should see to it, and it is their duty to keep this natural channel open and unobstructed. The public is entitled to this graded road and these bridges, but the public through its officers and agents should see to it that the owner of this land in question has his damages reduced to a minimum or to nothing.

The trial judge heard the witnesses, viewed the natural topography, and we are loath to disturb his finding.

The judgment is

AFFIRMED.

LETTON, J., not sitting.

MARY ETHEL THIES, APPELLEE, v. ANNA THIES, APPELLANT.

FILED MARCH 13, 1920. No. 20314.

Fraudulent Conveyances: PETITION. In a suit to set aside conveyances of real estate as in fraud of a judgment creditor, where the suit is based upon a judgment recovered in a county other than the one where the land is situated, a petition which does not allege that a transcript of the judgment has been filed in the office of the clerk of the district court of the county where the land is situated is subject to demurrer.

APPEAL from the district court for Keith county: HANSON M. GRIMES, JUDGE. *Reversed.*

A. H. Murdock, C. C. Sheppard and *F. P. Marconnit,* for appellant.

Kelso A. Morgan and *H. A. Dano, contra.*

MORRISSEY, C. J.

Plaintiff obtained a decree of separate maintenance against her husband in the district court for Douglas county. She then brought suit to set aside as fraudulent certain conveyances of real estate in Keith county made by the husband to his sister and to his attorneys. The petition recites the preliminary steps in their chronological order and sets out the decree of separate maintenance. It alleges that an execution had been issued in Douglas county and returned *nulla bona.* It does not allege that a transcript of the judgment had been filed in Keith county, or that any levy had been made upon the land. Defendants filed a general demurrer to the petition. The demurrer was overruled, the cause proceeded to trial, and judgment was entered in favor of plaintiff.

A number of assignments of error are contained in the brief. The first, and it seems to us the controlling one, is the ruling on the demurrer. May plaintiff maintain this action without alleging and proving that a transcript of her judgment has been filed in the county where the land is situated, or that a lien has actually attached to the land? There is an able discussion of this question in *Wadsworth v. Schisselbauer,* 32 Minn. 84. The language of this opinion was copied, and its reasoning followed, by this court in *State Bank of Ceresco v. Belk,* 68 Neb. 517. It would serve no useful purpose to repeat it here, but the rule there enunciated is supported by the weight of authority.

Under this rule, plaintiff was bound to docket a transcript of her judgment in the county where the land is situated before she could maintain an action of this character. Without a lien upon the land, there is no basis

for the suit. 2 Moore, Fraudulent Conveyances, 803, sec 54. See, also, note to *Ziska v. Ziska*, 23 L. R. A. n. s. 1 (20 Okla. 634).

It was error to overrule the demurrer. The judgment is therefore reversed and the cause remanded.

REVERSED.

DAY, J., not sitting.

JOSEPH SCHMIDBAUER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1920. No. 20618.

1. **Appeal:** COMPETENCY OF EXPERT: REVIEW. The competency of an expert witness is largely a question for the trial court, and unless the testimony received is inadmissible as a matter of law, and prejudicial, the ruling of the trial court will not be disturbed.
2. **Evidence:** COMPETENCY OF EXPERT. A witness who has previously been employed for a term of years in the handling and operation of electrically propelled street cars is competent as an expert witness on the question of probable speed of a car which he has observed in operation, and also as to the distance in which such car may be stopped by the proper application of brakes.
3. **Rulings** of the trial court on instructions given, and also on instructions refused, are approved.
4. **Trial:** SUBMISSION OF ISSUES. When there is sufficient competent evidence in the record to raise an issuable question of fact, it is proper for the trial court to submit the question to the jury.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John L. Webster and *W. R. King*, for appellant.

Murphy & Winters, contra.

MORRISSEY, C. J.

Plaintiff sues for injuries received when the wagon which he was driving was struck by one of defendant's cars in the city of Omaha. He claims to have been driving south on the west side of Twelfth street,

and before he approached defendant's tracks at the intersection of Twelfth and Douglas streets he looked to see if the track was clear and saw no car approaching. His team and the front end of the wagon, which was 30 feet in length, passed safely over, when the rear end of the wagon was violently struck by one of defendant's cars. Plaintiff was thrown to the pavement, suffering many cuts, bruises, and fractures. He has lost the hearing in one ear, and one leg is shortened one and a half inches. He has endured great pain and suffering, and, at the time of the trial, was still said to be suffering pain. He is permanently crippled, and appears to be wholly incapacitated from ever again performing manual labor.

Upon trial to a jury, there was a verdict in favor of plaintiff for $17,500. The district court ordered a remittitur of $7,500. Defendant appeals from the judgment entered, and plaintiff prosecutes a cross-appeal from the order of remittitur, under the provisions of chapter 247, Laws 1915.

Three general allegations of negligence are charged: (1) Defendant failed to sound a gong or bell; (2) the car was operated at an excessive rate of speed; and (3) defendant's servants in charge of the car, who saw, or in the exercise of ordinary care should have seen plaintiff in a place of danger, negligently failed to check the speed of the car or otherwise exercise due care to avoid the collision with plaintiff's wagon. There is more or less conflict in the evidence of the witnesses who saw the collision. Defendant claims plaintiff was driving parallel with the track, when he negligently changed his course and drove in front of the approaching car. There is evidence on behalf of defendant that the gong was sounded. But the mere sounding of the gong, unless done at a time to give reasonable warning to a person exercising ordinary care, would not be sufficient. There is conflict as to the speed at which the car was traveling and as to the distance it traveled after the impact. On the question of the last clear chance there appears to be less

ground for dispute than on the other questions of alleged negligence. The weight of the evidence shows that plaintiff was driving slowly across defendant's tracks. His team and the front end of his wagon passed safely over. The motorman, by keeping a proper lookout, could have seen defendant's horses when they first stepped upon the track. And, if his car was under proper control, in the exercise of due diligence, he would have been able to have brought his car to a stop before coming in contact with plaintiff's wagon. It is hard to escape the conclusion that the car was operated at an excessive rate of speed, or that the motorman did not exercise due diligence in bringing the car to a stop.

Taking up defendant's assignments of error in their order, the first question to determine is the admissibility of the evidence of certain witnesses for plaintiff. One Gremore testified as to the speed at which the car was traveling immediately before the collision. Defendant contends that this evidence was erroneously admitted because, as is said in the brief, Gremore did not see the car until it was within 35 feet of him, and it was coming directly toward him. It is claimed that he had neither time nor opportunity to form an evidentiary estimate of the speed of the car, and "the fact that the street car was brought to a stop while crossing the street intersection is a physical fact which disproves the testimony of Gremore." This witness had once been a street railway employee, having served both as a conductor and as a motorman, for more than two and a half years. He showed familiarity with electrically propelled street cars. In determining the competency of a witness to testify, much discretion is lodged in the trial court as to the admission of the testimony, and unless it is clearly inadmissible as a matter of law, and prejudicial, the ruling of the trial court will not be disturbed. *Jerabek v. Kennedy*, 61 Neb. 349. Gremore's testimony was clearly competent.

Further objection to the testimony of this witness is made because he was permitted to testify that, in his judgment, such a car as the one having the collision with plaintiff's wagon, operated at a speed of from 6 to 8 miles an hour, as claimed by defendant to be the fact in this case, might have been stopped within from 8 to 10 feet. Gremore's experience had been with cars controlled by hand brakes, while the car described in the evidence was controlled by an air brake. The cars on which he had worked and with which he had experimented were two-motor cars, while this car was a four-motor car. The superintendent of transportation of defendant testified as an expert, and his testimony indicates that a car controlled by an air brake may be stopped in a shorter distance than one controlled by a hand brake. This being true, Gremore's estimate of the distance within which a stop could be made, if based upon his experience with a hand brake, would be more favorable to defendant than to plaintiff. Defendant's superintendent of transportation also testified that there was not much difference between the stopping of a two-motor and a four-motor car. What has heretofore been said in regard to the testimony of this witness also applies to this objection. The testimony was properly admitted, and its weight was a question for the jury.

Instructions 1, 2, and 5 are criticised as "superfluous, cumbersome, unnecessary, and prejudicial." These criticisms are not well taken. The instructions constitute a statement of the issues to be determined by the jury; without them the charge would not have been complete. Nor do they appear to be involved or prolix. It was the duty of the court to instruct on the issues. No erroneous or prejudicial statement is pointed out, and the instructions are approved.

Instruction No. 4 is criticised on the theory that there was no competent evidence that the car was operated at a high or excessive rate of speed; that there is evidence that the gong was sounded and evidence that it was not

sounded; and that there is no evidence showing that there was a failure to check the speed of the car. By instruction No. 4 these questions were left to the determination of the jury. Having reached the conclusion that the evidence which defendant claims was incompetent was properly admitted, it follows that this instruction was properly given, because there is sufficient evidence in the record to raise an issuable question of fact on each of the questions submitted under it. These holdings also dispose of defendant's requested instructions dealing with these questions.

The only question remaining is that of plaintiff's cross-appeal. We are convinced, after an examination of all the evidence, that the action of the district court in ordering a remittitur of $7,500 was proper. The judgment is

AFFIRMED.

DAY, J., not sitting.

AMOS C. MORRISON, APPELLEE, V. SCOTTS BLUFF COUNTY, APPELLANT.

FILED MARCH 13, 1920. No. 20848.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE: DAMAGES. If, on the trial of an action "brought to recover damages for injuries to a person or to his property caused by the negligence of another," plaintiff is found to be guilty of negligence directly contributing to the injury complained of, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory neligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of dam-

age sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained. Rev. St. 1913 sec. 7892.

2. Counties: CARE OF BRIDGES. A county is bound only to use reasonable care to keep its roads and bridges safe for the ordinary modes of public travel.

APPEAL from the district court for Scotts Bluff county: HANSON M. GRIMES, JUDGE. *Reversed.*

L. L. Raymond and *Robert G. Simmons,* for appellant.

Wright, Mothersead & York, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for injuries to himself and damages to his automobile because of alleged negligence on the part of defendant in failing to keep a bridge and highway in proper repair. Defendant appeals, assigning as error the giving of instructions Nos. 4, 5, and 6 by the trial court.

Instruction No. 4, after quoting section 7892, Rev. St. 1913, reads as follows: "In this case, if under the evidence you find that defendant was negligent, and that you should find for plaintiff, you should first determine what sum will compensate the plaintiff for the damage you find that he is shown to have sustained, taking into consideration such elements as you are told in the other instructions it is proper for you to consider, and then, if you believe from the evidence that the plaintiff and his wife were guilty of contributory negligence and that their negligence was as great as the negligence of the defendant, if any, and bore an equal part in causing plaintiff's damage, then you should deduct from the amount which you find will compensate the plaintiff for the damage sustained one-half of that amount, and return the balance as your verdict in this case. If, on the other hand, you should find that both the plaintiff and the defendant were negligent, but that the negligence of the plaintiff was not as great as that of the defendant, you should deduct less than one-half or more than one-half,

depending upon whether plaintiff's negligence was greater or less."

Is this instruction a correct exposition of the law of negligence under the statute? At common law, contributory negligence on the part of plaintiff, no matter how slight, was an absolute bar to recovery. The severity and injustice of this rule has in late years been recognized and the doctrine of comparative negligence has taken its place. Many jurisdictions no longer allow contributory negligence to be considered except in mitigation of damages. The federal employers' liability act, for example, provides: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 8 U. S. Comp. St. 1916, section 8659, p. 9423. Our statute does not remove contributory negligence as a bar generally, as does the federal statute, but provides that "contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison." Under the rule laid down by the trial court, plaintiff was allowed a proportionate recovery, even though his negligence equalled the negligence of defendant, or was gross in comparison. The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery. And even when plaintiff has established his

right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained.

By instruction No. 5, the court told the jury: "It is and was the duty of the defendant county to so construct its roads and bridges, and the approaches to its bridges, and to keep and maintain (them) in such condition as to make them safe for the traveling public to pass over and travel over them in the usual modes of travel." Defendant contends that the effect of this instruction was to make it an insurer of public safety. The rule is that a county is bound to use reasonable care to make its roads and bridges safe for the ordinary modes of public travel.

It is contended that instruction No. 6, told the jury that defendant by its answer admitted "the bridge in question was in the condition as by plaintiff alleged," whereas, it is claimed, the answer directly put the matter in issue. Counsel for plaintiff construe this instruction as merely telling the jury that plaintiff was not required to prove notice to defendant of the condition of the bridge and its approach before the happening of the accident. The instruction is of doubtful application; but as the cause must be reversed for the reasons already mentioned, we do not deem it necessary to pursue an analysis of it.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

DAY, J., not sitting.

SCANDINAVIAN MUTUAL INSURANCE COMPANY, APPELLANT, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 13, 1920. No. 20660.

Insurance: SUBROGATION. A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

E. E. Whitted, J. L. McPheely and *J. L. Rice, contra.*

LETTON, J.

Plaintiff, a mutual insurance company, issued a policy of insurance to Mrs. H. P. Johnson for $300 insuring "grain in barn, granaries, cribs or in stacks, * * * all while located and contained on the N. E. quarter of section 20, township 6, range 16, county of Kearney." The policy provided, among other things: "If the interest of the insured member be or become other than the entire, unconditional and complete and sole ownership of the property, * * * then and in such case the policy or certificate of insurance shall be void unless otherwise provided by agreement approved by the secretary and indorsed on policy."

A fire set by an engine of the defendant consumed grain in stacks upon the east half of the northwest quarter of the same section, which was owned by one C. M. Johnson. Plaintiff and her son and agent, John P. Johnson, as tenants, owned an undivided share in this grain.

The petition alleges that plaintiff, in accordance with its usual custom to pay losses occurring on other land than that described in the policy, paid the loss to Mrs. Johnson, and by reason thereof became subrogated to

her right against defendant; that John P. Johnson filed a claim with defendant for the loss of 223 bushels of wheat on the farm, and that defendant paid him in full for all damages to all of said property, including the share of C. M. Johnson, Mrs. H. P. Johnson and John P. Johnson, excepting only such loss or damage covered by insurance, which insurance was the insurance covered by the policy hereinbefore set out.

The receipt given by John P. Johnson to defendant recites that the payment was in full settlement of all claims resulting from the fire, and that "said fire destroyed wheat, ladder, pitchfork and other property, all of which was owned by me and on which there was no insurance and no mortgages."

It is alleged that the agent of defendant was informed of the insurance on the property, and deducted in the settlement the amount for which the insurance company, plaintiff, was liable, to wit, $160.10; that defendant is now estopped from denying the validity of the claim, and "that by reason of the payment of said loss sustained by the said Mrs. H. P. Johnson, C. M. Johnson and John P. Johnson, this plaintiff has become subrogated" to a right of action against the defendant for the $160.10 paid by it.

A demurrer to the petition was sustained. Plaintiff elected to stand upon the petition, and the action was dismissed. Plaintiff appeals.

The policy of insurance did not cover the grain destroyed, but only grain "while located and contained" on another tract of land. The policy also provided that, if the interest of the insured was other than the entire and sole ownership of the property, the policy should be void unless by agreement indorsed on the policy. The plaintiff was under no legal liability to pay the loss, and the payment made by it was purely voluntary. The law is well settled that one cannot by means of a mere voluntary payment be subrogated to a right which the payee may have against another. *Washburn v. Osgood,* 38 Neb.

804; *McKinnon v. New York Assets Realization Co.*, 217 Fed. 339. There is nothing in the petition to show that plaintiff was induced to pay the money by a promise on the part of defendant to repay the same, or that it was knowingly induced to alter its position to its detriment by any act of defendant. In short, no act is pleaded which raises an estoppel against the railroad company.

The petition does not state a cause of action, and the judgment of the district court must be

AFFIRMED.

DAY, J., not sitting.

MAY ROONEY, APPELLEE, V. CITY OF OMAHA, APPELLANT.*

FILED MARCH 13, 1920. No. 21352.

Master and Servant: EMPLOYERS' LIABILITY ACT: POLICEMEN. A qualified and acting policeman of the city of Omaha is an officer appointed for the regular term of good behavior, unless the office itself is abolished, and is not included in the class of workmen and employees entitled to compensation from the city under the workmen's compensation act.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed and dismissed.*

Frank L. Weaver, Harland L. Mossman and *W. C. Lambert*, for appellant.

George H. Merten, contra.

ROSE, J.

This is a claim under the workmen's compensation act. Frank Rooney, while performing the duties of a policeman in the city of Omaha, was feloniously shot January 30, 1918, and as a result died the next day. The claimant for compensation is his widow. The district court allowed her $1,140, and in addition $12 a week for 350 weeks and $200 for the expenses of his last illness and

*Rehearing allowed. See 105 Neb. p——.

funeral. From a judgment in her favor for these items, the city of Omaha has appealed.

It is contended on behalf of the city of Omaha that it is not liable to claimant under the workmen's compensation act. A class of employees and workmen protected by the statute is described as follows:

"Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term." Rev. St. 1913, sec. 3656 (Laws 1917, ch. 85, sec. 5).

The city of Omaha in its control over the police department is a governmental agency of the state. Frank Rooney, when assaulted was in the service of the city as a policeman at a salary of $125 a month. He was at the time attempting to uphold the law. He had been required to take an oath of office and to give an official bond. Rev. St. 1913, secs. 4171, 4208. Statutes and judicial opinions refer to policemen as officers. Rev. St. 1913, secs. 4171, 4208, 5300; *State v. City of Lincoln,* 101 Neb. 57. By appointment or election Rooney was a public officer. Rev. St. 1913, sec. 5300; *Blynn v. City of Pontiac,* 185 Mich. 35; *Schmitt v. Dooling,* 145 Ky. 240, 36 L. R. A. n. s. 881, and note. The duties of a municipal police officer in enforcing the laws are governmental in character. *Gillespie v. City of Lincoln,* 35 Neb. 34. In *Adams v. City of Omaha,* 101 Neb. 690, it was said:

"There can be no doubt that the state, because of the interest that the state at large has in enforcing the laws and in protecting property from fire, has jurisdiction over the police and the fire department."

Claimant insists, however, that her husband was not an official, appointed "for a regular term of office," within the meaning of the exception to the statutory provision declaring that employees and workmen shall include

"Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." This point presents the controlling question raised by the appeal. Under the charter of the city of Omaha a policeman can only be removed for cause after notice and a hearing. Rev. St. 1913, sec. 5300; *State v. City of Lincoln*, 101 Neb. 57. It follows that a police officer of the city of Omaha is appointed for the term of good behavior, unless the office itself is abolished by law. This term of office seems to be a "regular term" within the meaning of the workmen's compensation act. The word "regular," describing the "term," appears to have been used by the legislature in the popular sense of "conformable to law" to distinguish officers included in the exceptions from the workmen and employees in the general class. In this sense the compensation allowed by the district court is not authorized by the workmen's compensation act. The judgment below is therefore reversed and the claimant's proceeding dismissed.

REVERSED AND DISMISSED.

LETTON and DAY, JJ., not sitting.

MABEL RICH, APPELLEE, v. JOHN M. FULTON, APPELLANT.

FILED MARCH 13, 1920. No. 20620.

1. **Contracts: MARRIAGE CONTRACT: PUBLIC POLICY.** A marriage contract, entered into within five years from the time that either the husband or the wife of the contracting party shall have absented himself, is void as against public policy, unless such absent husband or wife was dead or divorced. Rev. St. 1913, sec. 8768.

2. ———: ———: **EVIDENCE.** Evidence examined, and *held* not to show that the absent husband was dead or divorced.

3. ———: ———: **FALSE REPRESENTATIONS.** Representations made by the defendant that the husband of the plaintiff is dead, even though false, will not justify her in entering into a marriage contract with him within five years from the time of the beginning of the ab-

sence of her husband, unless the evidence shows that he was at the time dead.

4. Seduction. To constitute seduction, the female must be seduced; that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing. Her affections must be gained, her mind and thoughts polluted. Sexual indulgence, induced merely by desire to gratify passion, does not constitute seduction.

5. Contracts: MARRIAGE CONTRACT: PUBLIC POLICY. A promise of marriage, in consideration that the promisee should, before marriage, have sexual intercourse with the promisor, is void.

APPEAL from the district court for Pierce county: WILLIAM V. ALLEN, JUDGE. *Reversed.*

M. H. Leamy, for appellant.

John W. Blezek and *O. S. Spillman, contra.*

CORNISH, J.

From a judgment awarding the plaintiff $10,000 damages for breach of promise of marriage, induced by fraud and deceit, resulting in debauchery, humiliation, and loss of a husband, defendant appeals.

It is contended by the plaintiff that the defendant represented to her that her husband was dead, when he did not know whether he was dead or not, and that therefore he is estopped to deny that her husband was dead.

Defendant denies that he made such representation. He admits that for a period of time they lived in the same house, sustaining improper relations, and that a child was born, the result of the illicit relations.

Defendant, 56 years of age, was a farmer, a widower, living with his boy on his farm. The plaintiff, 44 years of age, married and with two children, would come to the farm to help in the household work, returning at intervals to her home. At her second or third stay at the farm the illicit relations began. At about that time she commenced an action for divorce from her husband, which was dismissed 29 months afterwards, three days before the trial of this action. A question of fact arises whether the divorce action was commenced before or after

their first act of sexual indulgence. If immediately afterwards, then she would hardly be heard to say that she was led to do the act by any representation touching her husband's death. A careful consideration of the testimony convinces us that such act was committed afterwards. We are further of the opinion that the evidence does not show that she relied upon the representation in giving her consent to sexual indulgence, or that she would have a right to rely upon the representation, if made.

Public policy will not permit a married person to enter into a marriage contract with another when his or her spouse is alive and not divorced. A contrary rule would lead to bigamy, which is a violation of positive laws. It would disturb the peace of families and offend against the decency and good order of society.

Section 8768, Rev. St. 1913, defining bigamy and providing punishment therefor, and which, as we have held, does not make intent an element of the crime, contains a provision as follows: "Nothing contained in this section shall be construed to extend to any person whose husband or wife shall be continually and wilfully absent for the space of five years together and unheard from, next before the time of such marriage."

We are of opinion that this provision states the rule of public policy. One should not remarry "for the space of five years," unless he knows that his absent spouse is dead or divorced.

Cases have arisen where a married man has deceived a woman into believing that he was unmarried, in which the courts have held that in a suit for damages the defendant is estopped to deny that he was unmarried. This is upon the theory of fraud; that the duty was upon him to know whether he was married or not, and not to deceive the other contracting party. These cases have hardly any application here, because here the duty was upon the plaintiff, in the first instance, to know whether her husband was dead before entering into another mar-

riage relation. No case is cited in which the courts have permitted the married person to recover.

Taking the plaintiff's evidence as true, it does not appear that the defendant, in his statements to the plaintiff, ever pretended to have personal knowledge that her husband was dead; he had merely heard that he was dead. She thought he told her who had informed him, but could not remember that person's name.

It would seem that a married woman, of the plaintiff's age, would know that a statement made or a promise given, in the very midst of the contention which ended in her yielding to the defendant's passionate desires, would not be altogether reliable. If it be suggested that she, too, might have been moved by passion, then the answer is that, in so far as the parties to such a transaction are induced merely by sexual desire, the law gives no right of action either in contract or in tort. The law contemplates only the seduction of virtuous women; otherwise, she is a partaker in the offense and consents to the injury. Her affections must be gained and her mind and thoughts polluted by the deception. A promise of marriage, the consideration of which is present sexual connection, is void. It would be to legalize a contract for prostitution. However, this discussion is somewhat irrelevant, because it is not seriously contended that the evidence showed that plaintiff's husband was in fact dead. Holding, as we do, that the marriage contract was itself void, it follows that plaintiff's cause of action must fail.

This conclusion does not mean that the child, born of the illicit relations, may be abandoned by its father; nor that the mother shall bear the burden of its support and maintenance. In *Craig v. Shea,* 102 Neb. 575, we held, in a suit brought by the mother as next friend of the child, that she could maintain an action in equity against the putative father to declare the child's status and recover for its support and maintenance.

For cases bearing upon the questions involved, see *Reynolds v. State*, 58 Neb. 49; *Staley v. State*, 89 Neb. 701; *Johnson v. Iss*, 114 Tenn. 114, 108 Am. St. Rep. 891; *Commonwealth v. Mash*, 7 Met. (Mass.) 472; *Davis v. Pryor*, 112 Fed. 274; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67; *Williams v. Igel*, 116 N. Y. Supp. 778; *Smith v. McPherson*, 176 Cal. 144, L. R. A. 1918B, 66, and note; *Paddock v. Robinson*, 63 Ill. 99; *People v. DeFore*, 64 Mich. 693; *Wilson v. Carnley*, 1 K. B. 1908 (Eng.) 729; 9 C. J. 324, sec. 6; 16 Cyc. 741.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., and ROSE, J., dissenting.

DAY, J., not sitting.

J. R. WATKINS MEDICAL COMPANY, APPELLEE, V. S. M. HUNT, DEFENDANT: FRANK CAMPBELL, APPELLANT.

FILED MARCH 13, 1920. No. 20783.

1. **Physicians and Surgeons:** ITINERANT VENDOR: MISDEMEANOR. Section 2726, Rev. St. 1913, quoted in the opinion, construed, and *held*, that to constitute the offense described the accused, an itinerant vendor, must "publicly profess to cure or treat diseases," etc.
2. **Monopolies:** ACT LIMITING SALES. Interpreted as a law to limit the sale of patent and proprietary medicines to pharmacists, such section would be unconstitutional as attempting to create a monopoly, and not necessary for public health or safety.
3. **Commerce:** SALES: PARTNERSHIP. A nonresident corporation entered into a written contract with a resident of this state for the sale of its products (medicines, extracts, and other articles), to be delivered f. o. b. at a point outside of the state, and to be shipped into this state and here resold at retail by the purchaser, as an itinerant vendor, within certain designated territory. The corporation was to incur no expense for receiving, storing or selling the goods, and it was not to share in the profits of the business,

but did agree to credit purchaser with the purchase price of unsold goods. *Held*, that this agreement did not constitute a partnership or agency; *held*, that it was not void as against public policy because violative of a criminal statute relating to itinerant vending of drugs; and *held*, further, that such transaction constitutes interstate commerce, which cannot be affected by any local statute of this state regulating the disposition of goods so sold, so as to deprive the foreign corporation of the right to sue for balance due for such goods.

4. **Principal and Surety:** CONSIDERATION: EXTENSION OF TIME. Where a contract of guaranty recited the consideration of $1 paid the guarantors, and a part of the consideration was an extension of time on a balance due by the principal under a former contract, there was sufficient consideration to support the contract of guaranty.

5. ———: DELIVERY OF BOND. "In the absence of evidence to the contrary, it will be presumed that the delivery of a bond was unconditional." *Gyger v. Courtney*, 59 Neb. 555.

6. ———: BREACH OF OBLIGATION: RECOVERY. A surety, for a sufficient consideration, undertook that his principal would pay a certain prior indebtedness at a time specified. The amount of the obligee's recovery from the surety for a breach of the written contract is the amount of the indebtedness which the principal has failed to pay in accordance with its terms. The fact that it was a prior indebtedness, and that the principal was insolvent can make no difference in the amount of recovery, even though the surety signs upon a condition, not complied with, of which condition the obligee had no notice.

APPEAL from the district court for Webster county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

Bernard McNeny, for appellant.

L. H. Blackledge and *Tawney, Smith & Tawney, contra.*

CORNISH, J.

The defendant Frank Campbell (appellant) denies liability as surety, upon two grounds: First, that the contract is void as against public policy; second, that he signed as surety upon condition, not complied with, that one Charles Fuller would also sign.

The case is before us solely upon the pleadings, findings and judgment of the trial court, without bill of exceptions.

It appears that at the time of entering into the contract sued upon the defendant Hunt had become indebted to the plaintiff in the sum of $666.83, for certain goods and merchandise, consisting of medicines, extracts, and other articles manufactured by plaintiff, the exact character of which is not shown. It was agreed that the time of payment of the amount due should be extended; that defendant Hunt should have the exclusive right to sell the goods of plaintiff in a particular territory; that he should devote his time thereto and visit farm houses as often as three times a year; that he would purchase the goods of the plaintiff at Winona, Minnesota, pay the freight, and conduct the business at his own cost and expense, the plaintiff having no share in the profits, but agreeing to give him credit for unsold goods shipped and delivered by Hunt to plaintiff at Winona.

Appellant contends that the contract is void as against public policy. The contention is based upon section 2726, Rev. St. 1913, which reads as follows: "Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of any disease or injury, or who shall by writing, printing, or any other method, publicly profess to cure or treat diseases or injury, or deformity, by any drug, nostrum, manipulation, or other expedient, shall be deemed guilty of a misdemeanor," etc. It is argued that this section describes two classes of offenses, one for vending and another for publicly professing to cure. We question this construction. The wrongdoer must "profess to cure," etc.

The word "or" in the third line of the section renders construction difficult. The word "vendor" appears to be the subject of the sentence. If the language before the word "or" is interpreted to include all vending or itinerant vending of drugs, etc., then the qualifying

phrase following the word "or" would seem to be superfluous, because the word "who" must refer to "itinerant vendor of any drug," etc. It would seem difficult or impossible to make the section read as if it commenced as follows: "Any person who is an itinerant vendor of drugs," etc.

The title of the act and its contents show that it was not intended to deal with patent and proprietary medicines, but merely to "regulate the practice of medicine." This subject is dealt with at section 2735, Rev. St. 1913, where the right of wholesale or retail dealers to sell patent or proprietary medicines is reserved.

Another reason for such interpretation would be that a law, attempting to limit the sale of patent and proprietary medicines to pharmacists, would be a law tending to create a monopoly not necessary for public health or safety, and therefore unconstitutional and void. *People v. Wilson,* 249 Ill. 195.

Every presumption is indulged in favor of the findings of the trial court and in support of the judgment rendered. Besides making certain special findings, the court found generally in favor of the plaintiff. While the record before us shows that the contract in part contemplated the itinerant vending of medicines, and the answer of defendant Campbell alleges such vending, the allegations of the answer are denied in the reply. The court's findings do not show such vending, or that defendant Hunt ever professed to cure diseases in any way, or that such profession was contemplated by the contract. As stated in plaintiff's brief, for all the record shows affirmatively, the medicines referred to in the contract might have been for animals, not men; or sales may have consisted of "extracts, or other articles."

The defense is not available for other reasons. The plaintiff, to make his case, did not need to show either sales of medicine to Hunt or that Hunt sold medicines at retail. The record shows affirmatively that the indebtedness sued for was indebtedness arising from previous

sales of goods of plaintiff to Hunt under a previous contract. What that contract was, or whether it contemplated itinerant vending, is not shown. It had been fully executed, and the balance due agreed upon and evidenced by a note. Defendant Campbell, as surety, guaranteed the payment of this indebtedness.

We recently held in *In re Estate of Lowe, ante*, p. 147: "When plaintiff can maintain his cause of action without the aid of an illegal act or one that might be construed as *contra bonos mores*, he will be allowed to recover." The plaintiff is not seeking to enforce the terms of the contract challenged by appellant as against public policy. Conceding that the law prohibited any act, there is nothing in the record to show that plaintiff or defendant Hunt performed such prohibited act. The general finding for plaintiff must be held to indicate the contrary. The appellant ought not to be permitted to shelter himself behind the provisions of the statute inhibiting certain provisions of the contract, which provision the plaintiff is not seeking to enforce. Common honesty forbids it. *McCall Co. v. Hughes*, 102 Miss. 375, 42 L. R. A. n. s. 63.

Again, the agreement to sell to defendant Hunt goods f. o. b. cars at Winona relates to interstate commerce and cannot be affected by the local statutes of this state. The contract under consideration was for the sale of goods to Hunt and did not create an agency. The plaintiff had no warehouse, office or place of business in this state. It did not pay expenses of receiving, handling, storing or selling goods. It was not a partner in the business, nor did it share in the profits. If we were to interpret section 2726, above quoted, as one regulating the sale of patent and proprietary medicines, it could not have extra territorial effect. The defendant, having purchased the goods, would be required to pay for them, no matter what the laws of Nebraska might be, touching his manner of disposition of them. *Menke v. State*, 70 Neb. 669; *Dr. Koch Vegetable Tea Co. v. Malone*, 163 S. W. (Tex. Civ. App.) 662; *Watkins Medical Co. v. Hollo-*

way, 181 S. W. (Mo. App.) 602; *Watkins Medical Co. v. Coombes,* 166 Pac. (Okla.) 1072; *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1.

Appellant also contends, and the trial court found, that he signed the contract in suit as surety upon condition that one Fuller should also sign before its delivery, which condition was not complied with. The trial court found that there was no evidence that plaintiff, prior to the delivery of the bond, had notice of such condition, and further found, as a matter of law, that the bond was delivered to and accepted by plaintiff in good faith.

The rule appears to be that, "In the absence of evidence to the contrary, it will be presumed that the delivery of a bond was unconditional." *Gyger v. Courtney,* 59 Neb. 555. The surety trusts the principal. If there is anything upon the face of the bond which would suggest inquiry to the ordinarily prudent man, the rule is otherwise. *Middleboro Nat. Bank v. Richards,* 55 Neb. 682; *Galbraith v. Shores-Mueller Co.,* 178 Ky. 688; *Watkins Medical Co. v. Hogue,* 210 S. W. (Ark.) 628; Pingrey, Suretyship and Guaranty (2d ed.) sec. 51; Stearns, Suretyship (2d ed.) sec. 108.

It is urged by appellant that in procuring the bond defendant Hunt acted as the agent of the plaintiff, who is therefore charged with notice. As before stated, we are of opinion that defendant Hunt never became the agent of plaintiff. Regardless of that question, however, an agent in procuring a bond, covering good faith or liability to his principal, is, in the nature of the case, not acting for the principal. He is the principal in that transaction. The bond is antecedent to and a condition of his agency. Their interests are not identical. See *Galbraith v. Shores-Mueller Co., supra.*

It is further urged that, inasmuch as the record shows that the indebtedness, payment for which was guaranteed, was a past indebtedness, and that at the time defendant Campbell signed as surety Hunt was insolvent, there can be no liability against Campbell, because plain-

tiff has not been damaged. It is said that Campbell's liability is based upon estoppel, he being estopped to deny the validity of the contract only because the plaintiff did not have notice of the condition upon which he signed it; that as between two innocent persons (plaintiff and Campbell) recovery should, in justice, be limited to actual damages suffered.

This argument assumes the validity of the contract. It does not attempt to deny that it was based upon a good and sufficient consideration. It did have a good consideration, to wit, the entering into a new contract, extension of time of payment, and payment of one dollar. Being a valid and binding contract, we think that the damage which plaintiff sustained from a breach of it is the amount of loss sustained from Campbell's failure to keep his promise that if Hunt did not pay the indebtedness he would. This necessarily follows if we are to consider Campbell's promises as binding upon him. When there is taken out of a contract of surety its undertaking against loss from insolvency, there may be little, if anything, left. The rule contended for would apply with much force to the case of a promissory note, without consideration or obtained by fraud, in the hands of an innocent purchaser. Equity might say, in such case, that the innocent holder's recovery should be limited to the amount paid and interest. Contrary to equity (in the opinion of the writer), the courts have generally held that the innocent holder can recover the face value of the note. In the instant case, there is no way that the promisee can be saved from damage except as the promisor keeps the promise that he has made, for which promise the promisee (without fault) has paid a consideration. There is no reason in law why a surety may not undertake that an insolvent will pay his debts as well as one who is solvent. Hunt did pay on the $666.83 indebtedness so as to reduce it to $384.88.

We are of opinion that the judgment appealed from should be

AFFIRMED.

LETTON and DAY, JJ., not sitting.

ROSE, J., dissenting.

I dissent from the adoption of that part of the syllabus and the opinion relating to monopoly and interstate commerce. These matters are not necessary to a decision. Parties to future litigation should not be prejudiced in advance by these unnecessary rulings. The court in the future should not be embarrassed by them in determining issues between parties who have not had an opportunity to present their views thereon. The state should not be put to the expense of publishing dicta.

STATE, EX REL. FRED C. AYRES ET AL., APPELLANTS, V. DARIUS M. AMSBERRY, SECRETARY OF STATE, APPELLEE.

FILED MARCH 13, 1920. No. 21212.

1. **Statutes: REFERENCE: PETITION.** Under sections 2335 and 2337, Rev. St. 1913 (amended, Laws 1919, ch. 86), it is not requisite that each sheet of referendum petitions, circulated for signatures, where the referendum is sought as to the entire act, shall be attached to a full and correct copy of the measure on which the referendum is demanded. If referendum is desired upon a portion of the act only, that portion which the petitioners desire submitted should be printed upon the petition.

2. ———: ———: ———. Under section 2337, *supra*, it is requisite that the referendum petition, taken as a whole, which includes all of the various sheets, have attached to it, when offered for filing, a full and correct copy of the measure.

3. ———: ———: ———. In the instant case, the act sought to be referred contains 461 pages. *Held*, that a law requiring a full copy of the act to be attached to each sheet of the petition, containing room for 20 petitioners and no more, would be unreasonably obstructive.

4. ———: ———: PERMISSIVE LEGISLATION. Section 1D, art. III of the Constitution, provides as follows: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation." Under this provision, legislation permissible

must be such as frees the operation of the constitutional provisions from obstruction or hindrance. Any legislation which would unreasonably hamper or render ineffective the power reserved to the people would be unconstitutional. Reasonable legislation to prevent fraud, or to render intelligible the purpose of the proposed law, would not be objectionable as not facilitating the operation of the amendment.

5. ———: ———: DUTIES OF SECRETARY OF STATE. The duties of the secretary of state are ministerial. His duties relative to referendum petitions are defined by statute. He would have no power to exercise functions strictly judicial in their nature.

6. **Appeal:** JURISDICTION: TIME. Where the parties to an action have stipulated for its hearing upon the merits in this court, and have proceeded to prepare and file briefs in accordance with the stipulation, and appellee in his brief suggests that the court is without jurisdiction to hear the appeal because it was not taken within ten days, as provided by statute, but no plea or motion, objecting to jurisdiction, was ever made, the court may disregard the suggestion and argument made in the brief.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Reversed, with directions.*

Dexter T. Barrett, for appellants.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes and *Burkett, Wilson, Brown & Wilson, contra.*

C. M. Skiles and *A. G. Wolfenbarger, amici curiæ.*

CORNISH, J.

Mandamus to compel the secretary of state to file a referendum petition upon Senate File No. 2, enacted at the 1919 session of the legislature, and known as the "Code Bill," which petition the secretary of state refused to file, on the ground that there was not attached to the various sheets or sections of the petition a "full and correct copy" of the enacted law. Relators appeal from a judgment sustaining the secretary.

Section 2335, Rev. St. 1913 (amended, Laws 1919, ch. 86), is in part as follows: "The following shall be substantially the form of petition for ordering the referen-

dum against any act or any part of any act passed by the legislature of the state of Nebraska.

"Petition for Referendum.

"To the Honorable————, Secretary of State for the State of Nebraska: We, the undersigned citizens and legal voters of the state of Nebraska and the county of ———, respectfully order that the Senate (or House) Bill No. —— entitled (title of act, and if the petition is against less than the whole act then set forth here the part or parts on which the referendum is sought)," etc.

The petition in controversy complied in all respects with this provision of the law, showing title of the act, but did not have attached to it a copy of the law.

Section 2336 gives the form of petition for proposed legislation by initiative. This section requires the proposed law to be set forth in the petition, or attached to it.

Section 2337 provides in part as follows: "Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the law or amendment to the Constitution so proposed by the initiative petition; but such petition may be filed with the secretary of state in numbered sections for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. Not more than twenty signatures on one sheet shall be counted. When any such initiative or referendum petition shall be offered for filing, the secretary of state, in the presence of the governor and the person offering the same for filing, shall detach the sheets containing the signatures and affidavit and cause them all to be attached to one or more printed copies of the measure so proposed by initiative petitions, or of the act or part of an act against which referendum petitions are filed."

Relators cite our opinion in *Bartling v. Wait*, 96 Neb. 532, as decisive of the question in dispute. The respond-

ent argues that in that decision section 2335, *supra,* only was construed. No detailed discussion of the language used in section 2337 is entered into; and it is probably true that some of the questions involved in the proper interpretation of section 2337 were not considered by the court at that time, and that the rule laid down might not come under the doctrine *stare decisis.* On the other hand, the immediate question was in issue. A purported copy of the act was printed on the petition. It omitted an important word, and it was urged that this made the petition void, because section 2337 required "a full and correct copy of the act proposed" to be printed upon the petition. We held that section 2335 governed, and that section 2337 was inapplicable to referendum petitions. In so holding we, in effect, held that "a correct copy" of the measure need not be attached to referendum petitions.

It is to be observed that to secure intelligent petitioning the need for an attached copy is not at all the same when referring legislation as when initiating it. In the one instance, the voter presumably knows the law and is informed, except in cases where only a portion of the law is being referred, and, if not, can get exact information. In the other, presumptions are to the contrary. This distinction is recognized in the constitutional amendment itself; the section providing for initiative requiring an attached copy of the proposed law, which requirement is omitted from the section providing for a referendum.

Bearing upon the question of the construction of the statute, we have to consider also the language of the initiative and referendum amendment to the Constitution as follows: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation." Const., art. III, sec. 1D. Under this provision, legislation permissible must be such as frees the operation of the constitutional provisions from obstruction or hindrance. Any legislation which would hamper

or render ineffective the power reserved to the people would be unconstitutional. It is urged that a law which requires a 461-page book to be attached to each of 1,472 sheets, circulated for 20 names, is obstructive; that the expense and inconvenience of it would sometimes render practically, if not quite, impossible the reference of measures; that it is an absurd and unnecessary hardship, especially so when it is considered that those circulating the petition are, ordinarily, persons working voluntarily, without pay, in what they conceive to be the public interest. We are of opinion that in some cases at least this would be true, and that the law, as interpreted by the respondent, would be open to that objection. Of course, laws to prevent fraud "facilitate," because failure to prevent frauds would render the amendment itself objectionable as a means of legislation.

In view of the constitutional provisions and of our decision in *Bartling v. Wait, supra,* we have reached the conclusion that section 2337 is inapplicable to the form of the petition circulated; that it is unnecessary that each sheet for referendum petitioners' signatures have attached to it a true copy of the act; that in this particular it is a sufficient compliance with section 2337 that the referendum petition, taken as a whole, which includes all of the various sheets, have attached to it, when offered for filing, a full and correct copy of the measure. This was done in the instant case.

Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law. A law requiring a full copy of a 461-page act to be attached to each sheet would be unreasonable and unnecessarily obstructive. In practice it has never been thought necessary, in submitting a law to the voters, that a full copy of it should be attached to the voter's ballot. Accordingly, section 2340 of the act requires the ballot title to contain only an impartial statement of the purpose of the measure to be prepared by the attorney general. Such legislation, for

the purpose of informing a referendum petitioner, may tend to facilitate the operation of the law. The people are conservative. In the absence of fraud, they will be inclined to vote "no" to a proposition which they do not understand and which purports to change existing laws.

The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience.

Relators in their brief devote an argument to the proposition that under our Constitution and laws the secretary of state is a ministerial officer, without power to exercise judicial functions, and that his duties relative to referendum petitions are strictly defined by statute. Of course, this is true; but, holding as we do that the petition should have been filed, we deem it unnecessary to enter into a discussion of this question, as applied to the facts and circumstances of the case in hand.

Respondent in his brief calls our attention to a provision in section 2339 of the statute, as follows, "Either party may appeal to the supreme court within ten days after a decision is rendered," and suggests that the action should be dismissed for want of jurisdiction. It appears that judgment was entered August 2; motion for a new trial overruled August 5; and transcript filed in this court August 19. It appears further that on October 24 the parties stipulated in this court that the case should be advanced for hearing "upon its merits." Afterwards, respondent procured time for preparing and filing briefs. We are of opinion that this suggestion, based upon a provision which is more or less in the nature of a statute of limitations, coming after stipulation for hearing upon the merits and after having subjected the opposing party to the costs incident to preparing briefs, may and should be disregarded. This question might have been raised by plea or motion to dismiss for want of jurisdiction,

but was not. *Lloyd v. Reynolds,* 26 Neb. 63; *Patterson v. Woodland,* 28 Neb. 250.

The judgment of the district court is reversed. It is further ordered that a writ of mandamus issue out of this court, requiring respondent, as secretary of state, to accept and file the referendum petition tendered, detaching sheets containing signatures, and otherwise proceeding in accordance with the statute and the law as laid down in this opinion.

REVERSED.

ROSE, J., dissents.

LETTON, J., not sitting.

The following opinion on motion for rehearing was filed June 29, 1920. *Former judgment vacated, and appeal dismissed.*

1. **Appeal:** JURISDICTION. The supreme court has no power to exercise appellate jurisdiction in proceedings to review the judgments of the district court, unless a transcript is filed with the clerk of this court within the time prescribed by law for taking appeals.

2. ———: TIME: INITIATIVE AND REFERENDUM ACT. In actions arising under the provisions of chapter 159, Laws, 1913, as amended by chapter 86, Laws 1919, appeals from the district court to the supreme court must be taken within ten days from the rendition of the judgment or final order in the district court.

3. **Statutes:** CONSTRUCTION. "The word 'may' in public statutes should be construed as 'must' whenever it becomes necessary to carry out the intent of the legislature; but in all other cases this word, like any other, must have its ordinary meaning." *Kelly v. Morse,* 3 Neb. 224, followed.

4. **Appeal.** Record examined, and the case *held* to be an appeal from the judgment of the district court, and not an original action for mandamus in this court.

5. **Statutes:** INITIATIVE AND REFERENDUM ACT: TITLE. The title of the initiative and referendum act (Laws 1913, ch. 159) examined, and *held* sufficient to cover those provisions in the act relative to procedure in the district court and limitation of time for appeal, as such matters are found to be germane to the general subject, expressed in the title as "An Act to provide for carrying into effect the initiative and referendum," etc.

DAY, J.

In our former opinion in this case, *ante*, p. 273, the facts are sufficiently set forth to an understanding of the controversy, and need not be repeated here.

Upon our initiative a reargument has been had addressed solely to the question of the jurisdiction of this court. The respondent contends that we are without jurisdiction of the subject-matter, for the reason that no transcript of the proceedings was filed with the clerk of this court within the time prescribed by law, and that the filing of such transcript within the time prescribed is a necessary precedent to our jurisdiction. The respondent relies upon the provisions of the statute affecting appeals in cases arising under the act for carrying into effect the initiative and referendum powers reserved by the people (Laws 1913, ch. 159), and particularly upon a portion of section 5 thereof. This provision of the law is referred to in the argument as section 2339, Rev. St. 1913, which has been repealed by chapter 86, Laws 1919, retaining, however, the exact language found in the original section, viz.: "Either party may appeal to the supreme court within ten days after a decision is rendered." The order of the district court from which the appeal was taken was entered August 5, and the transcript of the proceedings filed with the clerk of this court on August 19 — some 14 days after the final order. In our former opinion we held that the question of jurisdiction might have been raised by a plea or motion to dismiss, but as this was not done, and the parties had stipulated to advance the case and try it "upon its merits," and the parties had gone to the expense of printing briefs, that the objection to the jurisdiction would be deemed to have been waived. In support of this view, we cited *Lloyd v. Reynolds*, 26 Neb. 63, and *Patterson v. Woodland*, 28 Neb. 250. Upon a reconsideration of the question of our jurisdiction, we have become convinced that the position taken in our former opinion is wrong. Except in the class of cases mentioned

in article VI, sec. 2 of the Constitution, wherein original jurisdiction is conferred on this court, it exercises appellate jurisdiction only, and appellate jurisdiction of the subject-matter can only be conferred in the manner provided by statute, and cannot be conferred by stipulation of the parties. The question of the jurisdiction of this court where the transcript was not filed within the prescribed time for taking an appeal has been several times before this court. In *French v. English,* 7 Neb. 124, the transcript was not filed within the period prescribed for taking appeals, and a motion to dismiss for want of jurisdiction was sustained. To the same effect, see *Clark v. Morgan & Co.,* 21 Neb. 673; *Patterson v. Woodland,* 28 Neb. 250; *Record v. Butters,* 42 Neb. 786; *Renard v. Thomas,* 50 Neb. 398. In *Allis v. Newman,* 29 Neb. 207, the failure to file the appeal within the time prescribed was due to the fault of an officer of the court. The motion to dismiss was overruled, the court saying that a party will not be permitted to suffer through the omission of an officer of the court. This case was later disapproved in *Stull v. Cass County,* 51 Neb. 760. In that case the transcript was not filed within the time prescribed. The attorneys for the respective parties stipulated: "All objections as to service of this bill of exceptions out of time and filing of same in supreme court after one year since trial of case are waived, as court reporter was unable to furnish it in time for regular service and filing in supreme court in the time required, and at time of service was mislaid by the county attorney and found today." The case was dismissed for want of jurisdiction. The court in commenting upon the stipulation used this language:

"The foregoing did not excuse the failure to file a certified transcript of the pleadings and judgment within the statutory period, since it only purported to waive the filing of the bill of exceptions out of time. Moreover, jurisdiction of the subject-matter cannot be conferred by the stipulation or agreement of parties. The

statute is mandatory as regards the time of taking appeals and proceedings in error, and the time for doing so cannot be extended by agreement of the parties. * * * We are aware that this statement is opposed to *Allis v. Newman*, 29 Neb. 207, but the decision therein is in conflict with the numerous adjudications of this court in other cases. See *Sturtevant v. Wineland*, 22 Neb. 702; *Schuyler v. Hanna*, 28 Neb. 601; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891; *Fitzgerald v. Brandt*, 36 Neb. 683; *Moore v. Waterman*, 40 Neb. 498; *Record v. Butters*, 42 Neb. 786; *Renard v. Thomas*, 50 Neb. 398. The decisions in these cases are followed, and that in *Allis v. Newman, supra*, disapproved."

In *Kock v. State*, 73 Neb. 354, the transcript was not filed within the statutory time allowed for appeals. The question of jurisdiction was raised in the brief. In commenting upon the question of jurisdiction the court said:

"So it is clear that we are without any jurisdiction to review the proceedings and judgment of the trial court herein. This is to be regretted, for the reason that the sentence in this case seems so excessive, considering the value of the property alleged to have been stolen, as to be almost unconscionable. If we were at liberty to assume jurisdiction of this case, we would, under the power given us by section 509*a* of the Code, reduce the sentence to a period of two years. Having no jurisdiction, we cannot grant the accused any relief, and he must resort to executive clemency."

In the case of *Dirksen v. State*, 86 Neb. 334, briefs were filed by both parties. The court of its own motion dismissed the proceedings in error because the transcript was filed after the time limited by law. It will thus be seen that we have uniformly held that jurisdiction of the subject-matter cannot be conferred by stipulation or consent of the parties, nor does the filing of briefs constitute a waiver. Nothing but the filing of a transcript in this court within the time prescribed can vest this court with jurisdiction of the subject-matter.

No stipulation, consent, or waiver of the parties can take the place of the filing of the transcript. The case of *Patterson v. Woodland*, 28 Neb. 250, cited in our former opinion, is an authority supporting this opinion In that case, it was said: "As the transcript and petition in error were filed after the expiration of a year from the rendition of the judgment, the right to prosecute error had ceased."

Lloyd v. Reynolds, 26 Neb. 63, is readily distinguishable from the present case. In that case the transcript and petition in error were filed within the year (the time then prescribed), and the court would have jurisdiction of the subject-matter. After the year expired the parties stipulated waiving the issuance and service of summons. It was said: "The transcript and petition in error were properly filed in the court within the year, and the defendant could lawfully enter his appearance herein after the expiration of that time."

In *Fromholz v. McGahey*, 85 Neb. 205, it is said: "We have uniformly held that filing an unauthenticated transcript of a judgment of the district court did not give us jurisdiction of the controversy, but that the terms of the statute must be observed and a *certified* transcript of the judgment filed within the time limited by law." See, also, *Snyder v. Lapp*, 59 Neb. 243; *McDonald v. Grabow*, 46 Neb. 406; *Moore v. Waterman*, 40 Neb. 498. While it is a fact that in a few cases decided since the doctrine of *Allis v. Newman* was overruled it has been intimated that the default of an officer of the court might warrant an extension of time for filing an appeal, an examination of these cases discloses that such statements are merely inadvertent expressions and pure dictum, and it may further be said that since the decision in *Stull v. Cass County*, 51 Neb. 760, no appeal has ever been held in this court, unless the transcript was filed within the statutory time. To hold otherwise would be illogical. There is in this case no pretense that the relator was prevented from filing his transcript by the fault of any officer of the court.

The next question which suggests itself is whether the time of taking the appeal is to be governed by the provisions of chapter 159, Laws 1913, as amended by chapter 86, Laws 1919, which is the special statute relating to cases arising under the initiative and referendum act, or is it to be governed by section 8186, Rev. St. 1913, as amended by chapter 140, Laws 1917, which is the general statute relating to appeals. If the former, the appeal must be perfected in ten days, provided the word "may" as used therein means "must." If the latter, the appellant is given three months in which to appeal. That the legislature, by this act relating to the initiative and referendum, intended to prescribe a complete method of putting into practical effect the constitutional provision relating to the initiative and referendum, there can be no reasonable doubt. The language is clear and unambiguous. The act sets forth in detail the necessary steps to be taken to carry out its provisions. It provides that, if the secretary of state shall refuse to accept or file the petition, "any citizen may apply, within 10 days after such refusal, to the district court for a writ of mandamus; * * * that the district court of Lancaster county shall have jurisdiction of all litigation arising under the provisions of this act;" that such suits shall be advanced on the court docket and decided by the court as quickly as possible; and that "either party may appeal to the supreme court within 10 days after a decision is rendered." By this act ample provision is made for the protection of the citizen in every constitutional right, and if, as in this case, he has not complied with the terms of the law, the fault is his, and not of the law. This expression of the legislative will is binding on the court as well as the citizen, and cannot go unheeded without legal justification. It is a recognized principle, approved by this court, that when a new right is created by act of the legislature, and a new remedy is created by the same act, applying to the same subject, the remedy so prescribed is exclusive. *Swaney v. Gage County,* 64 Neb.

627. One of the purposes of the act was to provide an adequate and speedy method of testing in the court any legal obstacles which might be urged against the submission of an act of the legislature to the initiative and referendum. To give it practical effect, it was necessary to place limitations upon the time within which the action could be brought, and within which appeals could be taken.

The relators seek to avoid the effect of the provision of the statute, "Either party may appeal to the supreme court within ten days after a decision is rendered," by urging that the word "may," as used therein, is permissive, and not mandatory. In view, however, that this provision relates to matters for carrying out the provisions of the initiative and referendum laws — which of necessity must be voted upon at fixed dates — and the further fact that the act provides that "all such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible," convinces us that it was the intention of the legislature that such suits should be speedily determined and to aid this purpose the time in which an appeal could be taken to the supreme court was limited to ten days. This legislative intent can best be carried out by construing the word "may" as "must," and as imposing a duty rather than conferring a privilege. If it is to be construed in the sense of a permissive act, we can see no useful purpose which the clause quoted subserves. Under the general law pertaining to appeals, the party appealing has three months in which to file his transcript, but he may file it at any time after the judgment within the three months' period. The legislature undoubtedly had some purpose in putting into the section the clause quoted, and we have no doubt that the purpose was to limit the time in which the appeal could be taken in cases arising under the provisions of this chapter. In *Kelly v. Morse,* 3 Neb. 224, it is said: "The word 'may' in public statutes should be construed as 'must' whenever it becomes

necessary to carry out the *intent* of the legislature; but in all other cases this word, like any other, must have its ordinary meaning." *State v. Farney,* 36 Neb. 537.

The relators also contend that this court has jurisdiction of the subject-matter by virtue of its powers of original jurisdiction in cases of mandamus. While it is true that this court is given original jurisdiction in mandamus, it is also true that the district court has concurrent jurisdiction in that class of cases, and that from the judgment of the district court an appeal lies to this court. The real question here is whether this is an appeal from the judgment of the district court, or an original action in this court. All of the proceedings of the district court are set out in the transcript, including the judgment, overruling of the motion for new trial, and the settling of a bill of exceptions. The case is docketed in this court as an appeal. There is no application for a writ to issue from this court, which would be the practice if this were an original case, and nowhere, except in the argument, is there any pretense of invoking the original jurisdictional powers of this court. As we view it, there is no question but that this action invokes the appellate jurisdiction of this court, as distinguished from its original jurisdiction.

It is urged by relators that the provision of the statute above quoted, limiting the time in which an appeal should be taken, is unconstitutional, for the reason that the title of the act was not broad enough to cover that provision.

The title is as follows: "An Act to provide for carrying into effect the initiative and referendum powers reserved by the people in sections 1, 1A, 1B, 1C, and 1D of article III of the Constitution of the state of Nebraska; to regulate elections thereunder; to provide for a publicity pamphlet; to make it a felony to violate certain provisions of this act and to provide penalties therefor."

It is apparent that the law proposed had one general subject, and that subject is clearly expressed in the title — legislative provisions to provide necessary machinery for carrying into effect the initiative and referendum. The constitutional limitation, that no bill shall contain more than one subject, which shall be clearly expressed in the title, does not require an enumeration in the title of all the different matters germane to that subject which must necessarily be covered in the body of the act. The title of the act is not intended to serve as an index to the contents, but only as an indication of the general object sought, and it is implied that matters incidental to that object will necessarily be covered. The title in this instance, declaring the purpose of the act to be the carrying into effect the initiative and referendum provisions of the Constitution, sufficiently covers those provisions of the act providing for court procedure to determine the validity of referendum petitions, and therefore all the various details of that procedure, including the provision for filing appeal within ten days. The procedure provided is incidental and germane to the general object sought to be attained. *Cathers v. Hennings,* 76 Neb. 295; *State v. Power,* 63 Neb. 496; *Stewart v. Barton,* 91 Neb. 96; *State v. Ure,* 91 Neb. 31; *Robinson v. Kerrigan,* 151 Cal. 40; *Gay v. District Court,* 41 Nev. 330, 3 A. L. R. 224; *People v. Crissman,* 41 Colo. 450; *Adams v. Iten Biscuit Co.,* 162 Pac. (Okla.) 938; 36 Cyc 1017.

It follows from what has been said that our former judgment should be vacated, and the appeal dismissed for want of jurisdiction.

FORMER JUDGMENT VACATED, AND APPEAL DISMISSED.

ALDRICH, J., dissents.

DEAN, J., dissenting.

The sole question before us now is whether a constitutional amendment that was adopted in 1913, and that made the initiative and referendum principle of govern-

ment a part of the Constitution, shall be enforced, or whether that principle, so far as it relates to the present case, shall be destroyed by judicial construction of a part of an act of the legislature. The decision here cannot of course be concerned as to whether the subject out of which this controversy arose is in line with progressive legislation or otherwise. To the writer the former opinion, as written by the late Judge Cornish, with its conclusion seems fairly to interpret the language of the constitutional provision in question, and with that I am content. That opinion speaks for itself.

This is a proceeding in mandamus in which the district court and the supreme court are by the Constitution clothed with concurrent jurisdiction. Hence, under the facts in the present case, the question of jurisdiction may not be of so supreme and controlling importance, except in a technical sense, as may perhaps be made to appear in the opinion of the majority. This dissent is not based on the ground of concurrent jurisdiction. There seems to be controlling force, however, in the suggestion that the ten-day provision for appeal in chapter 159, Laws 1913, as amended by chapter 86, Laws 1919, is not exclusive, but is merely cumulative. Section 8186, Rev. St. 1913, as amended by chapter 140, Laws 1917, provides generally that an action may be appealed in three months, but it does not of course prevent an appeal from being perfected in ten days or in any number of days within three months. Except on the clearest ground, the court should not dismiss an action for want of jurisdiction of the subject-matter, and especially when a constitutional question is involved wherein the people have reserved the "power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the legislature." Const., art. III, sec. 1.

Subsequent to the adoption of the present Constitution, and from time to time as need arose, amendments were added which contain no language that is not clear

and easily understood. Notwithstanding argument to the contrary, there is no room in a Constitution for language of double or doubtful meaning. In this respect a Constitution is unlike some legislative acts. At times they contain subjects that are not clearly, or not at all, referred to in the title, and therefore remain undiscovered by the public until brought to light in court proceedings. Sometimes they change existing law without notice. The present case may illustrate the point.

Subjects that are undisclosed in the title of a legislative act are called "jokers." There are no "jokers" in a Constitution. It obeys the scriptural injunction. Its language is: "Yea, yea; and nay, nay." A "joker" is sometimes the offspring of a careless or a trustful legislature, and therefore it at times finds its way into an act by chance or by accident. Plainly speaking, there are two "jokers" in the act here in question. Both are referred to in this dissent, though but one is directly involved here, merely to show "a continuing course of conduct." One reads: "The district court of Lancaster county shall have jurisdiction in all cases of laws, parts of laws or initiative amendments to the Constitution with amendments to be submitted to the electors of the state at large." Laws 1913, ch. 159, sec. 5 (Rev. St. 1913, sec. 2339). With respect to the above-quoted language, it may be observed that it does not clearly appear by what constitutional right or authority the legislature presumes at all to confer jurisdiction of the subject-matter herein upon one district court to the apparent exclusion of all other district courts. It is obvious that the intention was to confer exclusive jurisdiction; otherwise the act would have been silent on this point. But, altogether aside from that, the question respecting jurisdiction is an independent "subject." Will it be contended that it is "clearly expressed in the title" or that it is at all referred to therein? If the right so to confer jurisdiction and so to legislate can be found in any lan-

guage in the Constitution, my attention has not been directed thereto.

The other reads: "Either party may appeal to the supreme court within ten days after a decision is rendered." That sentence covers the subject in the act that is directly involved here, and, unless it may be held to be "cumulative," the statute in which it occurs seems clearly to violate this language of the Constitution, namely: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

The title of the act under discussion follows: "An act to provide for carrying into effect the initiative and referendum powers reserved by the people in sections 1, 1A, 1B, 1C, and 1D of article III of the Constitution of the state of Nebraska; to regulate elections thereunder; to provide for a publicity pamphlet; to make it a felony to violate certain provisions of this act and to provide penalties therefor." The title refers to the regulation of elections; to the provision for the issuance of publicity pamphlets; to the provision that makes a violation of the act a felony and that a penalty is provided. But no reference is made in the title, by number or otherwise, to chapter 140, Laws 1917, that being the general law regulating appeals, and which the act in question purports to amend. The latter act provides that an appeal may be prosecuted to the supreme court in three months. The act in question provides for a reduction in time, for an appeal in this class of cases, to a period of ten days, and this it does without at all referring to chapter 140, Laws 1917. A new "statute of limitations" by the amendment of an important "practice act" is created without any reference thereto in the title and without any reference thereto in the body of the act. There is nothing in the title to

notify the members of the legislature or the public that another act is amended in a most important feature.

In view of the waiver of jurisdiction, entered into by the parties hereto prior to the former decision, it is doubtful if the distinguished counsel on either side knew of or were advised of the ten-day amendment until after the appeal was well along and was about to be argued. I do not agree with the statement in the opinion of the majority, namely: "It is apparent that the law proposed had one general subject, and that subject is clearly expressed in the title."

As pointed out in the former opinion, the case was advanced for hearing upon the merits. Afterwards, respondent procured time for preparing and filing briefs. In that state of the record we held that, the relator having been subjected by the respondent to the costs incident to preparing briefs and the like, the motion to dismiss should be disregarded. *State v. Amsberry, ante,* p. 273. Our conclusion and the opinion then adopted were right, and even if not based strictly on all of the grounds therein stated, as now held by a majority of the court, then on other grounds that cover the issues involved and that appear to be sound.

The Constitution provides: "This amendment shall be self-executing, but legislation may be enacted especially to faciliate its operation." Const., art. III, sec. 1D. The imperative "shall" and the permissive "may" as used in the same sentence are significant. They appear to have been used in their ordinary and popular sense, and, as though by the foresight of a seer, with the view of hedging about with safeguards the vital principle of the "initiative and referendum" and of preserving its "self-executing" feature, to the end that the principle itself be not destroyed. Until that supreme law, so adopted, is modified by its masters, its command is supreme, and of course must be obeyed by all persons alike. The Constitution of a state is the composite voice and the supreme law of its people. From time immemorial

it has been said that the voice of the people is the voice of God. Out of this sentiment in part no doubt has grown the reverence of our people for a Constitution.

The application of the principle of the initiative and referendum to the affairs of government is comparatively new. There are those who say it is only an experiment in self-government that has not yet been tried out, and that not all are agreed as to its merits. Even so, that question cannot be decided here. Except on the clearest ground there should be no deprivation of the people's right to the constitutional "power" that they "reserve to themselves * * * at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the legislature." Const., art. III, sec. 1. They were not so deprived in the former opinion. Hence, I dissent from the present opinion of the majority.

ANDREW J. REED, APPELLEE, V. FRANCIS WELLMAN, APPELLANT.

FILED MARCH 13, 1920. No. 20758.

Injunction: REMEDY AT LAW. "A litigant cannot successfully invoke the extraordinary remedy of injunction, the effect of which would be to obtain possession of real estate, unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate." *Hollinrake v. Neeland*, 94 Neb. 530.

APPEAL from the district court for Hitchcock county: ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

Lambe & Butler and *J. L. Rice*, for appellant.

J. F. Ratcliff, *C. E. Eldred* and *J. F. Cordeal*, *contra.*

DEAN, J.

Plaintiff and defendant own adjoining farms that are divided by the east and west half-section line. A dis-

pute having arisen as to the true location of the division line, plaintiff began this action to enjoin defendant from interfering with his alleged possession of a strip of ground that each party, as a part of his legal subdivision, claims to own. This strip is from a half to three-quarters of a mile long and is about 20 rods wide at the west end, gradually narrowing to a width of 10 or 12 rods at the east end. Plaintiff recovered judgment, and defendant appealed.

Plaintiff contends that the north line of the strip is the true dividing line and defendant contends for the south line. There is a dispute between the parties respecting possession and ownership. Sometime between the early part of 1905 and the winter of 1908 a two-strand wire fence was built by defendant on the south line of the strip, which has been maintained by him from thence continuously and without interruption as a pasture fence. From the time the fence was erected defendant has always been in the exclusive possession of the strip.

In July or August, 1917, plaintiff entered defendant's inclosure, without his knowledge, and pursuant to a survey then recently obtained by him, set posts about two rods apart and five feet south of the north line of the strip, and along its entire length, to which he attached a single strand of wire with a gate opening. Plaintiff contends that this so-called fence is within five feet of the true boundary line and that its erection entitles him to possession. He makes no claim to any act looking toward possession before the erection of the single-strand wire fence.

Soon after discovering plaintiff's structure within his inclosure, defendant took it down and threw it over his own fence on the land of plaintiff, who subsequently took it home as he testified. About two days afterward plaintiff, with the assistance of his boys, the sheriff being present, but not in his official capacity, removed the two strands of wire from the posts of defendant's fence for the entire distance, except about 30 rods, and while so

engaged defendant and two others put in an appearance, and plaintiff and his party went away. Before parting a few belligerent expressions were exchanged, but no violence was done by either party to the other. This action followed.

The court found that each party was claiming the right of possession when the action was begun. To plaintiff was "awarded an injunction restraining defendant from trespassing upon said tract of land until it is determined by the court in an appropriate proceeding that defendant has the right of possession to said tract."

We have examined the case *de novo* and conclude that the evidence does not support the judgment. We think the court erred in granting plaintiff the relief for which he prayed. Prior to plaintiff's entry, defendant seems to have been in the quiet, peaceable and undisturbed possession of the strip for many years, but whether under claim of ownership we do not decide. Plaintiff seems to have invoked the extraordinary writ of injunction for the sole purpose of obtaining possession when at the time he had a plain and adequate remedy at law. *Mohat v. Hutt*, 75 Neb. 732; *Hollinrake v. Neeland*, 94 Neb. 530. His claim of possession is not sustained by the record.

We conclude that defendant was in possession when this suit was begun, but this opinion is not to be construed as deciding any question involving title. The right to bring an appropriate action, as pointed out by the learned trial court, to determine the question of title remains open. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON and DAY, JJ., not sitting.

ANDREW J. REED, APPELLEE, V. THOMAS E. WELLMAN, APPELLANT.

FILED MARCH 13, 1920. No. 20759.

APPEAL from the district court for Hitchcock county: ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

J. L. Rice and *Lambe & Butler,* for appellant.

J. F. Ratcliff, C. E. Eldred and *J. F. Cordeal, contra.*

DEAN, J.

In this case the pleadings and the material issues that are involved are the same as those in *Reed v. Wellman, ante,* p. 292, that is decided at this sitting. In both cases the land of the defendants joins and is situated immediately north of plaintiff's land. Ownership of a part of the strip in dispute is claimed by the defendant in this case. The cases were consolidated and tried together in the district court, and on appeal they have been heard here and decided as one case. The decision in the former case controls in the present case.

The judgment of the district court is therefore reversed and the action is dismissed.

REVERSED AND DISMISSED.

LETTON and DAY, JJ., not sitting.

LIZZIE WICKERSHAM, APPELLEE, V. GEORGE F. PHILLIPS ET AL., APPELLANTS.

OMAHA TRIBE OF INDIANS, APPELLEE, V. GEORGE F. PHILLIPS ET AL., APPELLANTS.

LAURA LYONS, APPELLEE, V. GEORGE F. PHILLIPS ET AL., APPELLANTS.

FILED MARCH 13, 1920. No. 20879.

Appeal: TRIAL TO COURT: FINDINGS. "When a jury is waived, and a cause tried to the court, its finding of fact will not be disturbed if there is sufficient competent evidence in the record to sustain the finding." *Dravo-Doyle Co. v. Metropolitan Water District*, 102 Neb. 184.

APPEAL from the district court for Thurston county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Carter, Brackney & Carter, John R. Carter and *H. W. Brackney*, for appellants.

T. S. Allen and *Frank A. Peterson, contra.*

DEAN, J.

Plaintiffs sued in Thurston county on judgments obtained November 8, 1906, against defendants in the district court for Monona county, Iowa. The suits were consolidated in the district court and will be treated as one case here. Plaintiffs prevailed, and defendants appealed.

On June 3, 1904, the parties hereto entered into a written stipulation which provided that the case then pending in Monona county, Iowa, should "stand continued from term to term to await a decision of the circuit court of the United States," then pending at Omaha, wherein the United States was complainant. The parties defendant in that case were the same as in the Iowa case.

Defendants argue in their brief that, on the same date and within a few hours after the written stipulation was

signed, the attorneys for the respective parties in the Monona county case there entered into a verbal stipulation to the effect that, as the Iowa case and the federal case at Omaha "were identically the same, the verdict in the Omaha case was to settle all questions" in dispute between the parties, and the Iowa case should therefore be dismissed as soon as a judgment was rendered in the federal case. Plaintiffs admit the validity of the written stipulation, but deny that the verbal stipulation was ever made.

The evidence does not seem to support defendants' argument, and we think that, owing to the lapse of time that has intervened and the infirmity of memory for details, they must be mistaken about the terms for which they now contend. The verbal stipulation seems to us to be inconsistent with the terms of the written stipulation. It appears, too, that the parties plaintiff, in the case wherein the judgments sued on were obtained, were not the same as the parties plaintiff in the federal court at Omaha, nor was the relief granted in the respective courts the same. The judgment in the federal court was rendered November 17, 1904. It is now argued by defendants that the Iowa judgments were obtained by fraud in that, the pleadings having been settled and the issues joined, the judgments were obtained about two years after the date of the written stipulation, and in the absence of defendants. They now argue that the judgments, having been so obtained, are open to attack on the ground of fraud.

We deem it sufficient to say that, a jury being waived, the questions at issue were all fairly presented to the court, and, while the evidence conflicts, it seems fairly to support the findings and judgment. The court found specifically "that there was no fraud in the obtaining of the judgments of the district court of Iowa, for Monona county, sued on herein, and that the same are valid as against the defendants." When a jury is waived, a contested finding of fact will be sustained if there is suf-

ficient competent evidence to support it. *Dravo-Doyle Co. v. Metropolitan Water District*, 102 Neb. 184. The judgment is

AFFIRMED.

LETTON and DAY, JJ., not sitting.

JOSEPH WIT, SR., APPELLANT, V. JOSEPH WIT, JR., ET AL., APPELLEES.

FILED MARCH 13, 1920. No. 20929.

Deeds: SETTING ASIDE. A deed by parents to a son, made in part in consideration of money paid and in part for future work and labor to be performed and for certain specified commercial articles to be furnished, such work and labor not being peculiarly personal nor arising out of the relation of parent and child, cannot be set aside for partial failure of performance by the grantee.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed.*

Rolland F. Ireland, for appellant.

Bartos & Bartos, contra.

DEAN, J.

The plaintiff, Joseph Wit, Sr., sued for the cancelation of a deed to defendant Joseph Wit, Jr., his son, and for the cancelation of a contract that provided for certain work to be performed in the future and commodities to be furnished from time to time by defendant as consideration for the conveyance, and also for the cancelation of a $3,000 mortgage on the land described in the deed that was given by defendant to the plaintiff, upon repayment to defendant of certain money paid thereon. The mortgage was also given as part consideration for the land. Defendants' general demurrer was sustained, and, plaintiff refusing to plead further, the action was dismissed. Plaintiff appealed.

Plaintiff alleged that on February 21, 1906, being then 60 years of age, he divided the bulk of his land among his three adult sons by giving to each of them, respectively, certain deeds of conveyance. There is no controversy except in respect of the conveyance to Joseph Wit, Jr., to whom was deeded 240 acres. The grantee gave his father a $3,000 mortgage on the land so conveyed, with deferred interest bearing payments, and also entered into the contract in suit, all the instruments being a part of the same transaction and all duly recorded.

The contract provided generally that as part consideration for the conveyance of the land he agreed with grantors "to do and perform for them annually, all the necessary farm work, such as plowing, seeding, cultivating, hauling of manure, mowing of meadow, stacking of hay, and properly harvesting and husking and shelling and delivering to mill or market or bins," such work to be done on plaintiff's 80-acre tract on which grantors lived and so long as they lived. It was also provided that defendant would furnish free of charge "all teams, machinery and hired help necessary to successfully carry on such farm work," and that he would furnish annually to his parents "all the hay they may need and have use of for their live stock kept by them on said farm, and to furnish annual pasture for their six head of cattle on his farm, and to do all necessary hauling of all the necessaries of life, including fuel."

Plaintiff alleged that defendant failed to comply with the conditions of the contract in that he did not, for 1915, 1916 and 1917, furnish his parents with "any support, maintenance, necessities or comforts of life," and that, plaintiff and his wife having been so "deprived of a part of their maintenance and support and necessities of life, * * * plaintiff is entitled to have said deed canceled, * * * in order that this plaintiff and his said wife may in the future be provided with their maintenance and support and the necessities of life."

The contract in question makes no provision for support and maintenance, nor for personal services of any sort. The necessary farm work and the hauling that are specifically mentioned can all be performed by help hired for that purpose. In fact, the contract plainly provides that defendant shall furnish "all teams, machinery and hired help necessary to successfully carry on such farm work." The commodities referred to in the contract and the pasturage are purchasable in any farming community. The contract does not require the personal attention of any particular person for any particular or designated purpose. It appears to be a bargain and sale contract, and defendant can be made to respond in an action at law, which affords an adequate remedy, for any violation of its terms.

It is incumbent on the court to construe the contract as made by the parties. We cannot make a contract for them. Plaintiff places a construction on the contract in suit that does not seem to find support in that instrument. In the cases cited in support of his argument the contracts between the parent and the child, there under discussion, provide generally for services to be rendered by the child to the parent that are peculiarly personal in their nature in that they arise out of the relation of the parties, such as proper care in case of sickness and for medical attention, personal support and maintenance, and the like. But that situation does not appear in the present case.

The distinction between a deed that is made in consideration of future support of the grantor and a deed of bargain and sale is pointed out in the second paragraph of the syllabus in *Russell v. Robbins*, 247 Ill. 510: "A deed made in consideration of the future support of the grantor is distinguished from an ordinary deed of bargain and sale in that the grantor parts with his property in consideration of future support, which a court of equity cannot compel the grantee to furnish

and a court of law cannot make good in case the grantee violates his agreements."

In the present case fraud is not charged, nor does it appear that the conveyance was procured by undue influence. The contract is of record, and defendant cannot escape his legal liability thereunder.

The judgment is

AFFIRMED.

MORRISSEY, C. J., and LETTON, J., not sitting.

JOHN GRIGGS, PLAINTIFF, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT: LAMBERT, SHOTWELL & SHOTWELL ET AL., INTERVENERS, APPELLEES.

FILED MARCH 13, 1920. No. 21257.

Attorney and Client: ATTORNEY'S LIEN. Defendant sought on appeal to reverse a judgment for $2,500. While the appeal was pending and undetermined, plaintiff accepted $500 in full settlement, and also stipulated for a dismissal of the appeal, all without the knowledge of plaintiff's counsel, whose lien for an attorney's fee, based on a written contract with plaintiff, which provided that counsel should "have a lien for their services upon any money or property received in settlement or recovered by judgment," of which defendant had notice, was on file when the judgment was rendered. *Held*, that the settlement and the agreement to dismiss could not operate to deprive the lienors of their right to the enforcement of their lien upon the entire amount of the judgment.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

E. P. Holmes and *Guy C. Chambers,* for appellant.

Lambert, Shotwell & Shotwell and *Amos P. Scruggs, contra.*

DEAN, J.

Plaintiff recovered a judgment for $2,500, for personal injuries sustained while in defendant's employ, and de-

fendant appealed. While the appeal was pending here and undetermined, defendant paid plaintiff $500, which was accepted by him in full settlement of his claim. The parties at the time filed a stipulation that the appeal should be dismissed. The settlement was effected and the dismissal agreement entered into without the knowledge of plaintiff's counsel. Before the trial began in district court, plaintiff had contracted in writing with his counsel to pay an attorney fee contingent on the amount of recovery. The contingent fee contract provided that the interveners should "have a lien for their services upon any money or property received in settlement or recovered by judgment." To insure payment of their fee the interveners filed the contract in the district court, of which defendant had notice under section 272, Rev. St. 1913. When plaintiff's counsel discovered that settlement was made and that a stipulation to dismiss the appeal had been agreed upon, they asked and were given leave to intervene as claimants of an attorney's lien. We thereupon dismissed the appeal as to plaintiff and remanded the case, leaving the question of the attorney's lien to be heard and determined by the district court. When the hearing was had in that court, interveners recovered a "supplemental judgment" against defendant computed on the basis of their agreed share of the judgment as provided in the contract. From that judgment defendant appealed.

In respect of interveners' lien, defendant argues that it should be computed on the basis of plaintiff's settlement, namely, $500, and not on the basis of the $2,500 judgment, as contended by interveners. As applied to the facts we do not think defendant's argument is sound in law or equity. A good faith compromise and settlement between parties that is intended to bring vexatious and expensive litigation to an end, in which third parties have no interest, is always favored by the courts. But that is not the case before us.

There is evidence tending to prove that plaintiff was an improvident man of roving disposition. After the appeal was perfected he called on defendant's counsel at Lincoln and offered to settle for $200. Upon inquiry he said that he neither consulted nor did he intend to consult his counsel in the matter. Plaintiff was thereupon informed that a settlement could not be effected without the consent of his counsel, the lienors. Subsequently Mr. Stiers, the local claim agent of defendant for Lincoln territory, went from Lincoln to Omaha and called on interveners, informing them that plaintiff would settle for $200. Upon asking what they would be willing to accept in settlement he was informed that they would advise their client not to consider a settlement for less than $2,500, and that in payment of their fee they would not accept less than the amount represented by their lien. Sometime afterward plaintiff appeared at interveners' Omaha office and was advised against a settlement on Stier's terms. Before he left plaintiff informed his counsel that he would not settle with defendant. Subsequently the settlement and the agreement to dismiss were both entered into at Chicago between plaintiff and Stiers, who represented defendant; the chief claim agent of defendant having sent for him to come to Chicago and there meet plaintiff for that purpose.

The settlement, so far as it purports to affect the claim of the interveners, is of no force, because their rights were ignored. Their interest in the judgment became absolute upon rendition, and defendant could not thereafter, by a secret settlement with plaintiff, having notice, deprive them of the lien that was agreed upon. The contract between plaintiff and the interveners operated as an equitable assignment of the judgment to the extent of the interveners' claim, and, in the absence of reversal or modification on appeal, the plaintiff, having notice, could not give a valid discharge of the judgment, except as to his own unassigned interest therein, until payment

of the lien. *Corson v. Lewis,* 77 Neb. 446, on rehearing, 449; *Aspinwall v. Sabin,* 22 Neb. 73; *Union P. R. Co. v. Roeser,* 69 Neb. 62; *Desaman v. Butler Bros.,* 118 Minn. 198; *Weeks v. Wayne Circuit Judges,* 73 Mich. 256; *Louisville & N. R. Co. v. Proctor,* 21 Ky. L. Rep. 447; *Hammond, W. & E. C. R. Co. v. Kaput,* 61 Ind. App. 543; 2 Thornton, Attorneys at Law, secs. 425, 643; 2 R. C. L. 1081, 1082, secs. 171, 172. The evidence that $1,200 to $1,500 was the reasonable value of interveners' services in behalf of plaintiff Griggs was not denied by defendant.

It has been suggested that the appeal bond superseded the $2,500 judgment. True, but such bond is conditioned upon prosecuting the appeal to effect and without unnecessary delay. The terms of an appeal bond do not contemplate a surreptitious and secret settlement, by payment of one-fifth of the face of the judgment, and an agreement for a dismissal of the appeal, at a point 500 miles distant from the jurisdiction of the court in which the judgment was obtained, to the prejudice of lien holders, as in the present case. It is proper to observe that counsel for defendant were not concerned in the settlement as Chicago, nor in the dismissal agreement. We conclude that, in the absence of fraud or mistake, or of a reversal or modification of the judgment on appeal, plaintiff with notice could not by the settlement and the stipulation, both in question here, prejudice the rights of the interveners in the judgment.

The judgment is

AFFIRMED.

ROSE, J., dissents.

DAY, J., not sitting.

LETTON, J., concurring.

In this case the settlement and dismissal of the action were procured for a comparatively small sum in the absence of plaintiff's attorneys, who had filed a lien upon the judgment, of which the defendant had full notice. While the parties had a right to settle the case, they

could not by so doing divest the lien of the attorneys upon the judgment for their services actually rendered. While the fee provided for by the contract was a contingent one, such contingent fees are not unlawful in this state, and, if reasonable under all the circumstances, are approved by the courts. The evidence supports the finding of the court as to the value of the services rendered.

After the action was dismissed in this court, upon a showing by counsel the dismissal was set aside. Counsel then filed a petition in intervention setting up the facts as to their lien. Afterwards appellants dismissed the appeal with the consent of this court, but the matter of the attorneys' lien was left pending, and the issue as to the lien and its amount was remanded to the district court to determine. The dismissal of the appeal left the judgment in force so far as the attorneys' rights were concerned, and their lien attached thereto.

Authorities from other states are not of much avail here. In *Rice & Gorum v. Day*, 33 Neb. 204, Judge Maxwell says: "Whatever the rule may be in other states, it is well settled in this state that the lien of an attorney upon a judgment to the extent of his reasonable fees and disbursements is paramount to any rights of the parties in the suit or to any set-off." And the uniform course of our decisions has been to construe the lien statute in such a manner as to protect just and honest claims for services rendered when a proper lien has been filed and notice given. *Griggs & Ashby v. White*, 5 Neb. 467; *Aspinwall v. Sabin*, 22 Neb. 73; *Greek v. McDaniel*, 68 Neb. 569; *Counsman v. Modern Woodmen of America*, 69 Neb. 710; *Jones v. Duff Grain Co.*, 69 Neb. 91; *Hoyt v. Chicago, R. I. & P. R. Co.*, 88 Neb. 161.

The lien statute would be of little use to counsel who had obtained judgment in favor of a client, if the parties might, without their knowledge or consent, come together outside of the jurisdiction and settle a judgment for a small fraction of the amount recovered.

The language of Chief Justice Adams of the supreme court of Iowa in *Smith & Baylies v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, seems applicable here:

"But the defendant claims that it was its right to pay the claimant directly, in the absence of the attorneys, and without their knowledge. The right to make such payment would doubtless be valuable in many cases. It is well known that irresponsible and unscrupulous claimants can be settled with upon more favorable terms after expensive litigation, if they can be allowed to receive the whole payment and cheat their attorneys. But however valuable the right may be, this consideration has no weight when addressed to a court. Nor do we think that there is anything which we can notice in the objection that if a lien is allowed attorneys will advise against proper settlements by compromise. The lien is valuable, mainly, where the claimant is irresponsible."

When defendant made the settlement, it must be taken to have made it in view of and with the expectation that it would pay the just demands of the attorneys, so far as protected by the lien.

CORNISH, J., dissenting.

If the opinion properly states the law, then I think the next legislature should enact a new law, as the legislature of 1917 considered doing. The opinion in effect holds that the parties to a lawsuit cannot settle their controversy without the consent of their attorneys — a rule never before announced, so far as I know, by any court.

It would not be surprising if we lawyers, who have ourselves received contingent fees, should be biased in favor of a practice absolutely forbidden at the common law. At common law, settlements were always encouraged by the courts. Lawyers were regarded as officers of the court, and anything which had a tendency to change the attitude of the lawyer, so that he might become interested as a litigant, was frowned upon as against public policy. Beginning with Chancellor Kent, all of the great lawyers, whose names are honored by the profession,

have condemned or expressed forebodings of the practice. The objection is not that a litigant, unable to raise cash in order to be represented by an attorney, is permitted to let the fee be contingent upon success, but to a situation, illustrated by the case in hand, where the attorneys have more to win or lose, as a result of the lawsuit, than the litigant himself. The emolument going to the attorney should bear some proper relation to the service rendered. I have known an attorney to receive a fee of $5,000 for a day's work, when the same attorney would be ready to give his services for $50 a day, or less. The practice should be regulated by law. The attorney should not be permitted, unbeknown to the jury and perhaps to the judge, to become, in all essential respects, a litigant. Chancellor Kent said: "The purchase of a lawsuit by an attorney * * * is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge which he acquires in his professional character, to speculate in lawsuits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community." *Arden v. Patterson,* 5 Johns. Ch. (N. Y.) *44.

My special criticism here is that this decision violates precedent. Hitherto, while all of the decisions have not agreed in certain important respects, they have agreed upon certain propositions as follows:

(1) Any contract between an attorney and his client which seeks to give the attorney control over the litigation and to make him a part owner of the lawsuit is void as against public policy. The contract here does not, by its terms, attempt to give the attorney control of the lawsuit; the opinion does that.

(2) It is always the right of the parties to a lawsuit pending to come together and settle it. If collusively done to defraud the attorney, then there are varying

rules for the protection of the attorney against the fraud. Even after final judgment, when the rights of the attorney might be said to be more or less fixed or vested, the courts have held that the attorney cannot prevent a settlement for less than the amount of the judgment, if fairly made.

(3) A settlement, fairly made, is binding upon the litigants and their attorneys according to its terms. In such case, however, if the defendant has notice of an attorney's lien which has attached, he must not disregard it.

Coming now to the case in hand, it is to be observed that there was absolutely no fraud in the settlement made by the litigants, unless fraud can be predicated upon the mere fact that the litigants settled the case for less than the attorney would advise or consent to. Surely, if it was the right of the litigants to settle, it necessarily follows that no fraud can be found in the mere fact that they did settle. To say otherwise would be like disputing the sun.

To state, as in the syllabus of the majority opinion, that the settlement was had, "all without the knowledge of plaintiff's counsel," is inaccurate, unless the statement relies for its confirmation upon what, may we not say, comes near being a quibble. The opinion shows the contrary. When plaintiff came to defendant to settle, the defendant peremptorily refused to settle until plaintiff had received the advice of his attorney. This was had and settlement advised against. Afterwards the defendant told the attorney of the proposed settlement. The attorney had full knowledge of what the defendant proposed to do, even to the very terms of the settlement.

It would be foolish in the law to require that the settlement be had in the presence of the attorney who refuses to participate, or that he should know the hour and place of the settlement. It would be foolish also to require that the settlement be had in Lincoln, or Omaha, local

offices of defendant, rather than in Chicago, at its general office.

In the opinion it is said that the settlement was "surreptitious." Here, too, the opinion shows the contrary. A high court of justice cannot afford to attach such an epithet, which implies malice, to a litigant without good reason. The word should not be used.

A settlement without fraud having been made, a dismissal of the cause, in the absence of the attorney, could not make it fraudulent, because he was thereby deprived of no right. Dismissal follows settlement as a matter of course. The attorney could not prevent it. From first to last, no effort was ever made by defendant to deprive the attorney of his share of the amount to be paid in settlement. Primarily, fraud consists in colluding to defeat the attorney of his lien.

The opinion, as a whole, would hardly seem to make the case turn upon fraud. Constructive fraud, based upon the fact that the attorney was not notified of the proposed settlement, has never been found in any well-considered case. The settlement must be collusive, or, as the opinion says, "surreptitious." In any event, such a rule could not apply here, because the attorney had notice. Logically considered, it makes the attorney a part owner of the lawsuit, so that the litigants, in dealing with each other, are bound to procure the attorney's consent before a final settlement can be reached. For this, as I said, there is no precedent either in any text-book or decided case. In Minnesota, where the statute attempted to give the attorney a lien upon the cause of action (a state standing almost alone in this respect), it was held that the litigant could make a fair settlement against the consent of his attorneys.

Aside from consideration of public policy, the rule announced is unjust. A litigant's cause of action is his property. In all reason, he, and not his agent, must be permitted to manage his private affairs according to his own best judgment. In the absence of fraud, it will sel-

dom happen that any wrong will thereby be done to his attorney. In the instant case, the written contract between the attorney and client anticipated the case might be settled.

In 2 R. C. L. 1080, sec. 171, where the right of litigants to settle is discussed, it is said: "The lien of the attorney may be defeated by such act of the client, though the latter agreed to pay the attorney a percentage of the proceeds of the judgment, and notwithstanding an express agreement on the part of the client not to dismiss, settle, or compromise without the consent of the attorney. Even in those jurisdictions where the attorney's lien attaches by virtue of statute to the cause of action, to the property involved, or to money in the hands of the adverse party, it has been held that the client may compromise or settle the litigation without the consent of the attorney, but where such right is exercised the lien of the attorney will not be defeated thereby, but will attach to the proceeds of the settlement." And, further, at p. 1091, sec. 80: "The great weight of authority sustains the right of a client at any time before judgment, if acting in good faith, to compromise, settle, or adjust his cause of action out of court, without his attorney's intervention, knowledge, or consent."

In 6 C. J. 791, sec. 404, the right of the attorney, where compromise is effected before final judgment, is discussed. It is said that the amount of the lien is controlled by the settlement. 2 Thornton, Attorneys at Law, sec. 435; *Williams v. Miles*, 63 Neb. 851, 855.

In *Corson v. Lewis*, 77 Neb. 446, cited in the opinion, the right to settle was not in dispute. The attorney's lien filed was lost because the settlement was in good faith.

In *Cones v. Brooks*, 60 Neb. 698, it was held that our attorney's lien statute was "declaratory of the common law." At common law the attorney had no lien upon the judgment.

In *Patrick v. Leach,* 12 Fed. 661, the Nebraska statute was construed, and it was held that the attorney has no lien upon the judgment obtained by him in favor of his client. He has a lien on money in the hands of the adverse party going to his client. If we follow these decisions, the attorney could no more control the judgment or the lawsuit, in this state, than he could at common law.

In *Reynolds v. Reynolds,* 10 Neb. 574, where the client refused to go forward with the case and the attorney had spent his time and money in prosecuting it, the court permitted the attorney to be substituted as party plaintiff and proceed with the case. No settlement between the litigants was made. In *Jones v. Duff Grain Co.,* 69 Neb. 91, it was claimed by the attorney that a fraudulent settlement had been made to defeat him of his lien. The agreement was collusive. The attorney was not permitted to recover in that suit. It was stated, however, that if the settlement was collusive the attorney, in a proper case, might be permitted to prosecute the case to final judgment. This decision is contrary to the great weight of authorities. It has no application here, because here the case was not settled without the knowledge or consent of the attorney and by collusion. If, however, we concede the dicta in this case to state the law, and that the settlement was fraudulent and collusive, then the remedy would be that the settlement would be set aside and the attorney be permitted to prosecute the case to final determination. This right of the defendant, to have the case proceed after the settlement is set aside as fraudulent, is denied the defendant in the instant case.

In the majority opinion it is said in one place that the settlement was had while the action was still pending. This is true. In another place, it is said that the settlement was had after judgment and the rights of the attorney had become absolute. Just how there can be a judgment, giving the attorney or any one else absolute rights while the action is pending, I do not understand.

If it were suggested that, independent of a statutory lien, the attorney, by virtue of the contract made with his client, had some equitable rights in the cause of action, or the judgment appealed from, which would entitle him to control the cause, contrary to the judgment of his client, then the contract would be void as against public policy. Only by virtue of a statute, giving a lien upon final judgment, has he any rights in the judgment as such.

Since writing the above, I observe that A. L. R. has some late cases upon the subject:

In *Andrewes v. Haas,* 214 N. Y. 255, 3 A. L. R. 458, the court uses this sound language: "The notion (that the client must continue the litigation) that such a thing is possible betrays a strange misconception of the function of the legal profession and of its duty to society."

The opinion cites a Kentucky case. A later one, *Procter v. Louisville & N. R. Co.,* reported in 3 A. L. R. 461 (156 Ky. 465), holds that in a settlement like the one in hand attorney's fees are "to be computed as though the amount paid by way of compromise constituted the entire recovery."

The opinion also cites a Minnesota case. A later one, *Southworth v. Rosendahl,* reported in 3 A. L. R. 468 (133 Minn. 447), holds squarely that the litigant may settle without the knowledge or consent of his attorney, and in so doing "does not subject himself to the payment to the attorney of a contingent fee agreed upon in case of the successful outcome of the case." At page 472 there is an exhaustive note, and at page 485, discussing settlement after judgment, the note writer says: "But where the judgment has not become final, as where an appeal or a motion for a new trial is pending, the amount of the settlement, and not the amount of the judgment, controls as a general rule. (Cases cited.) And this is true, though the defendant was guilty of such fraud and undue influence in procuring the settlement as would entitle the client to have it set aside, where he has not

sought to have it set aside, but by his inaction has ratified the settlement."

I would have preferred an opinion more in accord with the Code of Ethics, adopted by the American Bar Association, which prohibits an attorney from acquiring an interest in the subject-matter of the litigation, and expresses the opinion that agreements for contingent fees should be under the supervision of the court.

WILLIAM HOLLMAN ET AL., APPELLEES, V. J. S. PATTISON & COMPANY ET AL., APPELLANTS.*

FILED MARCH 13, 1920. No. 20831.

1. **Executors and Administrators: ADMINISTRATOR'S SALE: RIGHT OF POSSESSION.** When real estate of a decedent has been sold at administrator's sale, debts paid, net proceeds distributed, and confirmation had, then a purchaser is entitled to possession from the time of confirmation of administrator's sale, and is not deprived of any of his rights by virtue of a lease to which he was not a party.
2. ———: **LEASE.** A lessee from an administrator is not entitled to a lease of more than one year, and option for a longer time is null and void.
3. ———: **ADMINISTRATOR'S SALE: RIGHTS OF PURCHASER.** A purchaser not a party to the lease of a building which he purchased at administrator's sale, is entitled to immediate rents and profits from date of confirmation of sale.
4. ———: **LEASE.** An administrator cannot lease an estate of which he is administrator beyond his term of office.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

Charles A. Chappell, M. D. King and *Raymond M. Crossman*, for appellants.

C. P. Anderbery, contra.

ALDRICH, J.

This case was an action in forcible entry and detainer to recover possession of one certain brick business block situated in the city of Minden.

*Rehearing allowed. See Opinion p. 847, *post*.

Plaintiffs were purchasers of this block in question, at administrator's sale, and the sale was confirmed by the district court on June 29, 1917. At time of sale and confirmation defendants were in possession of the premises under a lease. This property was part of the estate of Hannah E. Haws, deceased, and Frank I. Haws was administrator. His administration began June 1, 1914. He took possession of this block at that time, collected the rents, and distributed the same as per his authority. The building was occupied at one time by the Haws Hardware & Furniture Company, which firm was in financial distress and was desirous of quitting business. It is to the interest of the estate to lease the premises pending settlement and sale of the building. The administrator negotiated with J. S. Pattison & Company for the sale of the goods and for a lease of the building. The administrator and an heir of the estate and the attorney for the estate entered into negotiations. The defendant leased the building for one year, with the option of four years more. This condition or proposition was submitted by the administrator to the heirs of the Haws estate, and a contract was entered into between the Haws Hardware & Furniture Company, which was composed of the heirs of this estate and the defendants herein. This lease was authorized by the administrator in presence of Louis C. Paulson, attorney for the Haws estate, and also was witnessed by J. Haws, an heir to the estate, and is labeled: "Rent from July, 1915, to July 12—waived." Immediately upon making the lease on July 19, 1915, defendants took possession of the leased property and occupied the same continuously up to April 12, 1918, and are in possession of the same at the present time. In March, 1917, plaintiffs began to negotiate with the heirs of the Haws estate for the purchase of the property. It is claimed, and some testimony is offered, that the plaintiffs agreed in writing to recognize and to purchase this property subject to the lease, but this agreement was not introduced in evidence. Proceedings

were had in the district court to obtain license to sell this real estate to pay debts of the estate. These proceedings were instituted by the administrator of the estate. The license being obtained, the administrator was ordered, according to law, to sell the buildings, and pay debts, and in pursuance thereof the administrator sold the building to plaintiffs, received the purchase price, and paid the debts of the estate. It appears of record that final account of administration was dated July 18, 1917, and covered the period from June 1, 1914, to July 18, 1917. On July 19, 1917, the county court ordered hearing on final account to be set for August 18, 1917. On this date the county court approved the final account of Frank I. Haws, as administrator of Hannah E. Haws, deceased, and ordered distribution. On April 12, 1918, the administrator testified, on the hearing of the instant case in the district court, that he had paid the debts and distributed the net proceeds.

The first question of difficulty presented is: Was the lease executed by the administrator valid after the leased property had been sold at an administrator's sale? The sale was confirmed by the district court, debts were paid, and the net proceeds distributed among the heirs. The administrator had no authority to lease beyond this period. *Jackson v. O'Rorke,* 71 Neb. 418.

It appears of record that plaintiffs purchased these premises under license duly procured from the district court to sell the real estate to pay debts, and received administrator's deed. The lessees, who were in possession at the time of the sale, recognized the validity of the sale by paying the rent to the new purchasers.

It appears the administrator had leased the premises to defendants for one year, with the privilege of four years more. Are these plaintiffs estopped from claiming rights of possession which are adversary to the lessees? Defendants claim that plaintiffs are estopped from asserting superior title by virtue of this lease. We hold the grantees, plaintiffs, are not estopped from claiming

a superior title. These defendants claiming paramount title cannot rely upon an estoppel, because it grows out of a transaction to which they were not parties. It is also claimed that it was the intent of the parties to the administrator's deed, as well as to the quitclaim deed, that the title conveyed by these instruments should convey this property absolutely. An administrator cannot lease or otherwise impair possession of title to land by an instrument the effect of which may extend over and beyond his term of office, and defeat the purposes of administration.

It also appears of record that this administrator paid the debts, and, after doing so, distributed the net proceeds among the heirs, although it is not shown when the distribution or discharge of the administrator was had. But it does appear satisfactorily that the debts were paid and distribution of the net proceeds was had some time before the trial of this case and before judgment.

But it is claimed by defendants that this lease extended beyond the period of one year, with the option of extending the lease four years more. We hold that such a contract is invalid and unenforceable because its execution would defeat the object and purposes of an administrator's deed, prevent the settlement of the estate, and owing to uncertainty of the term of office extending beyond one year. It would appear to be contrary to public policy to allow administrators to lease premises for more than a year at a time or beyond the time when final settlement and distribution is made. Then, if it appeared to be advantageous to the estate at the close of the year, he could extend the lease for a year, and so on until there was a sale and final distribution. A purchaser at an administrator's sale is entitled to immediate rents and profits. These plaintiffs in a sense obtained possession of the premises in question. The defendants recognized and ratified plaintiff's title by payment of rents. A purchaser at administrator's sale becomes the owner from the period of the sale and its

confirmation by the court. The defendants or some of them were present at this sale.

Halliburton v. Sumner, 27 Ark. 460, is a case very similar to the one in hand: "Lands were sold by an administrator by order of the probate court; but, previous to the time of confirmation and subsequent to the time of sale, the same administrator, with the approbation of the probate court, rented the lands to another party. On unlawful detainer brought by the purchaser at the administrator's sale, *held,* that the purchaser was entitled to the possession from the time of ratification of the sale, and he was not deprived of any of his rights by virtue of the lease."

We hold there was no loss of jurisdiction. This action was not prematurely brought, because at the time of bringing it the sale was consummated, and it had received the confirmation of the court. When this situation is accomplished, the ratification retroacts, and the purchaser is regarded by relation as the owner from the period of the sale. Such purchaser therefore is entitled to the rents of the estate, and in the instant case he collected them.

In *Stone v. Snell,* 77 Neb. 441, this court held that an option to purchase land, "indeterminate as to time and accompanied by a deed deposited in escrow, is terminable at any time upon reasonable notice by the vendor." It was also held in the same case that "a vendee of land in the possession of a tenant takes the title subject to the unexpired term." The situation in the instant case is entirely different. The lessees in the present transaction were strangers to the title of the purchasers, while in *Stone v. Snell, supra,* they transacted their business and made their contract with the original owner of the title, and of course the owner of the original title was bound to recognize whatever lease he had made. The present purchasers at administrator's sale were strangers to defendants' lease, in no way participated in it. It must be said that the administrator's deed confirmed

by the district court carries a title superior to an administrator's lease when the lease may extend beyond his term of office.

It is also maintained that the doctrine of *caveat emptor* applies in the instant case. That is a wise and wholesome doctrine, but it has no application here, because the purchaser at an administrator's sale does not take the property subject to a lease that may result in a policy contrary to public interests. But if the doctrine of *caveat emptor* were here, it occurs to us that defendants' remedy would have been to enjoin this sale, for the reason that the same would interfere with lessees' rights and be against their property interests. If an administrator's rights and duties are no more than defendants claim them to be, such an action would have settled defendants' rights absolutely.

We are not unmindful of the rule in *Ashley v. Young*, 79 Miss. 129. We concur with that decision only in so far as it authorizes the administrator, during his term, with the concurrence of the heirs and the commission granted by the district court, to lease the real estate, or to sell so much as may be necessary to pay the valid debts of the estate. The instant case is slightly different on the facts from *Ashley v. Young, supra.* In the Mississippi case the sale was made subject to the lease, while in the instant case the sale ignores the lease. In the instant case the administrator, with the permission of the district court, sold the lands to pay the debts of the estate, and, when the debts were paid and all creditors discharged and the net proceeds distributed to the heirs, then we hold that the administrator is discharged by operation of law if he neglects to act under the provisions of the statute for such purposes. We hold that, when the debts have been paid and distribution of the net proceeds had to the heirs, then the administrator's official duties are at an end, and that he cannot lease the property beyond his term of office. If he could, he might lease it for a period of ninety-nine years instead of one,

and that would be granting an administrator, or executor, more power and authority than would be necessary to an honest and efficient administration.

In view of this discussion, and taking into consideration the best interests of all concerned, we hold the case must be affirmed.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

SUNDERLAND BROTHERS COMPANY, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 13, 1920. No. 20853.

1. **Fines:** DEMURRAGE ACT: CONSTITUTIONALITY. Sections 6159, 6160, and 6162, Rev. St. 1913, which impose liability on railroad companies for actual damages and in addition levy a fine or penalty, to be paid to the injured party, are repugnant to section 5, art. VIII of the Constitution, which requires that all fines and penalties arising under the general laws go exclusively to the school fund.
2. ———: ———: DAMAGES. Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a fine or a penalty.
3. **Constitutional Law:** DEMURRAGE ACT: DAMAGES. A statute which provides for more than compensatory or actual damages to be paid to an individual is in excess of legislative authority and is unconstitutional.
4. ———: ———. Where a statute makes a railroad company liable for one dollar per day per car for delay in forwarding, giving notices, or delivery, and in addition thereto imposes liability for actual damages caused by such delay, by necessary implication, is in violation of section 21, art. I of the Constitution.
5. **Eminent Domain.** The legislature cannot appropriate private property to private use.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

Byron Clark, Jesse L. Root and *J. W. Weingarten,* for appellant.

Baldrige & Saxton, contra.

ALDRICH, J.

This is an action brought under section 6159-6164, Rev. St. 1913, known as the "Reciprocal Demurrage Act," to recover demurrage alleged to be due from defendant railroad company for delay in forwarding and delivering carloads of sand and stone. These shipments were all intrastate. The court below rendered judgment for plaintiff, and defendant appeals the case to this court.

Section 6159, Rev. St. 1913, provides, among other things: "In less than carloads, not more than one cent per hundred pounds per day or fraction thereof with minimum five cents as damages, together with all other damages the consignor or consignee may sustain thereby." Also section 6160 provides, among other things: "Any railroad company failing to give such notices shall forfeit and pay to the consignee or other party whose interest is affected the sum of one dollar per car per day or fraction of a day's delay on all carload shipments, and one cent per hundred pounds per day or fraction thereof on freight in less than carload lots with minimum charge of five cents per day and not exceeding one dollar per day for any shipment in less than carload, after the expiration of said twenty-four hours, as damages, together with all other damages sustained thereby." Section 6162, provides: "The railroad company shall forfeit and pay to the shipper or consignee one dollar per car per day for each day or fraction thereof such delivery is delayed as damages and all actual damages sustained thereby." These quotations show clearly that the legislature intended to provide for a fine or penalty in addition to compensatory or actual damages, if not a fine or penalty, then for double damages. The sections are clear and unambiguous in their meaning and are subject to no other construction.

An unreasonable regulation which in effect deprives owners of property used in rendering public service, and operates as a limitation upon the rights of those devoting their property to public use and imposes double dam-

ages, a part of which is in the nature of a fine and a part as compensatory damages, constitutes a deprivation of property without due process of law and is a violation of the state Constitution.

A statute which takes property from one individual and gives it to another, not in compensation for any injury sustained, is contrary to the provisions of the Constitution securing property rights of private individuals.

An act of the legislature which provides for double damages comes under the rule in *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, and is unconstitutional.

If this statute under consideration only provided for liquidated damages, we would not hesitate to apply the rules laid down in *Graham v. Kibble*, 9 Neb. 182. In *Clearwater Bank v. Kurkonski*, 45 Neb. 1, the statute permitted a mortgagor to recover $50 as liquidated damages for failing to release a chattel mortgage. We validated that statute. In *Hier v. Hutchings*, 58 Neb. 334, liquidated damages were prescribed by section 361 of the Criminal Code (Rev. St. 1913, sec. 9255), and were held recoverable, and the section held valid.

Where a statute seeks to make a railroad company liable for one dollar per day per car, for delay in forwarding, giving notices, or delivery, and in addition thereto imposes liability for actual damages caused by such delay, the same is repugnant to the state Constitution. If the demurrage is treated as a fine or a penalty, the statute is repugnant to section 5, art. VIII of the Constitution, which provides that all fines and penalties arising under the general laws of this state shall go to the school fund. If treated as liquidated damages, the legislature is acting beyond its authority in seeking to appropriate private property to private use. Under section 21, art. I of the Constitution: "The property of no person shall be taken or damaged for public use without just compensation therefor." In the instant case the railroad company is liable for all actual damages. When

the legislature seeks to impose a greater liability in damages than compensatory damages, it is taking private property for private use, which is unconstitutional.

We are of the opinion that the quotations in the second paragraph of this opinion taken from sections 6159, 6160, 6162, Rev. St. 1913, were inducements for the passage of the particular sections; therefore sections 6159, 6160, 6162, *supra*, are unconstitutional.

The judgment of the district court is reversed and plaintiff's action dismissed.

REVERSED AND DISMISSED.

LETTON and DAY, JJ., not sitting.

The following opinion on motion for rehearing was filed September 27, 1920. *Rehearing denied.*

1. **Fines: DEMURRAGE ACT: CONSTITUTIONALITY.** Sections 6159, 6160, 6162, Rev. St. 1913, which imposed on railroad companies, for delay in shipment and delivery of goods carried, a liability in favor of the shipper for a specified sum in addition to all actual damages suffered by reason of such delay, are unconstitutional under section 5, art. VIII of the Constitution, which provides that all fines and penalties arising under the general laws shall go exclusively to the school fund.

2. **Case Criticised.** The case of *Clearwater Bank v. Kurkonski*, 45 Neb. 1, discussed and criticised.

FLANSBURG, J.

This matter now comes up on rehearing. Former opinion, *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.*, *ante*, p. 319.

The action was brought by the plaintiff, who had shipped building material in carload lots over defendant's railroad, and is based upon sections 6159, 6160, 6162, Rev. St. 1913, known as the "Reciprocal Demurrage Act," allowing recovery to the shipper of $1 per day, together with all actual damages sustained for each day's delay, in shipment and delivery of goods by the carrier.

The sole question presented is whether or not the provision of the statute, allowing $1 per day per car, to-

gether with all actual damages sustained, provides for liquidated damages to the shipper, or allows a recovery in the nature of a penalty.

If the allowance to the shipper is in the nature of a penalty, then the provision is in violation of section 5, art. VIII of the Constitution, providing: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed. * * * All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue."

The rule of distinction between penalties and damages is stated in *Haffke v. Coffin,* 89 Neb. 134, 138 (quoting from *Brennan v. Clark,* 29 Neb. 385) as follows: "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the subject-matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but, where the acts or omissions occasioning damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages."

That rule has been repeatedly followed by this court and is the rule generally recognized in other states. 17 C. J. 937, sec. 235, 945, sec. 238.

The purpose of liquidated damages is to furnish compensation for an injury sustained, and, if the amount provided does not bear a reasonable relation to the damage which might be contemplated by the parties, or if it is apparent that it was intended to more than cover

that damage, and is not compensatory merely, then it must be construed as a penalty. Such is the holding in *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681; *Brennan v. Clark*, 29 Neb. 385; *Squires v. Elwood*, 33 Neb. 126.

In the two cases last-above mentioned, the court held that there the damages were easily ascertainable, and the amount provided must have been intended as a penalty, as there was no need for liquidating the amount by agreement.

In the case of *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, and *Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521, a statute, which compels a railroad company to pay the owner of live stock killed upon the track double value of the property, has been held to provide a penalty and to be unconstitutional and void, since it is apparent that more than mere compensation is provided by the statute.

The plaintiff in this case relies upon the holding in *Graham v. Kibble*, 9 Neb. 182, and the cases which have followed that case, citing it as authority. *Phœnix Ins. Co. v. Bohman*, 28 Neb. 251; *Phœnix Ins. Co. v. McEvony*, 52 Neb. 566; and *Hier v. Hutchings*, 58 Neb. 334.

The rule, as stated in the case of *Graham v. Kibble, supra*, and as followed in the cases just above cited, is entirely consistent with the rule stated in the beginning of this opinion. In all of these cases statutes were involved which provided that a party could recover from a public officer a certain stipulated amount in damages, in case of the wrongful act or oppression of the officer in charging excessive fees, or in arresting a party who had been released on habeas corpus, etc.

In the case of *Graham v. Kibble, supra*, the amount of damages allowed by statute was $50, in case a public officer should charge excessive fees. It was argued that the statute provided a penalty. The court's decision, however, was based upon the proposition that the amount provided was in the nature of liquidated damages, though a part of the opinion by way of dictum discussed the

amount allowed as a penalty, and intimated that in the case of public officers a penalty could be provided. In the case of *Grand Island & W. C. R. Co. v. Swinbank, supra,* in which the court held that a statute allowing double damages against a railroad company for the killing of live stock was unconstitutional, Judge Irvine said (p. 526): "The so-called penal statute discussed in *Graham v. Kibble, supra,* was sustained as being a provision for liquidated damages. It related to a case where the actual damages are difficult, if not impossible, of ascertainment; whereas the statute we are considering requires the actual damages to be admeasured, and then arbitrarily requires the defendant to pay the plaintiff twice that sum."

By reason of the court's dictum in the case of *Graham v. Kibble,* that the amount allowed was a penalty, such provisions have later been referred to as penalties in the cases following that case. In the case of *Phœnix Ins. Co. v. Bohman, supra,* the court stated that the statute, allowing a party to recover $50 against an officer taking excessive fees, was highly penal in its nature. In that case and in the case of *Phœnix Ins. Co. v. McEvony, supra,* and of *Hier v. Hutchings, supra,* the constitutionality of the statute was not reasoned or discussed, but the statute was sustained simply on the authority of *Graham v. Kibble.* It further appears that those statutes should have been expressly sustained as providing liquidated damages, as was done in the former case.

The cases so far discussed, then, are in complete harmony, so far as the question has been expressly considered, upon the rule of determining between liquidated damages and a penalty. The plaintiff urges that the case of *Clearwater Bank v. Kurkonski,* 45 Neb. 1, is a case in favor of the constitutionality of the statute in question. The statute in that case provided for the recovery of $50 liquidated damages and also for actual damages sustained. It is apparent that the amount allowed, $50, if given in addition to actual damages, was

a provision for more than actual compensation to the person injured, and it would seem that, when that statute comes before the court again, that case must be overruled if the decisions in all the cases above referred to are to be adhered to. In the *Kurkonski* case, the question of allowing extra damages, in addition to the $50, is not discussed as tending to show that any more than compensation was intended to be provided by the statute. The opinion in that case discloses that the question of whether or not the $50 was a penalty was not very closely considered, and it is stated in the opinion that the amount was evidently intended as liquidated damages, and the case of *Graham v. Kibble, supra,* cited as authority.

That the legislature could provide liquidated damages, if it was apparent that the amount provided was intended to be compensatory only, has been held in the case of *Cram v. Chicago, B. & Q. R. Co.,* 84 Neb. 607, 85 Neb. 586. In that case, however, the statute was upheld on the ground that the amount allowed was to cover damages only, and the court stated that, if more than that amount had been allowed, the provisions must have been construed as a penalty.

In the case of *Smith v. Chicago, St. P., M. & O. R. Co.,* 99 Neb. 719, the court, in construing the statute involved in the *Cram* case, said that, though the statute provided for liquidated damages, that remedy was in addition to the common-law remedy, and that the shipper had a right to *elect* and waive the statutory penalty and recover his actual damages as at common law. The reasoning in that case makes it apparent that the court considered both remedies could not be allowed. The decision seems to have gone a great limit, however, in allowing the shipper to elect whether he shall recover his actual damages instead of the liquidated damages provided, if it is understood that such election is given for those damages which arise purely from delay, and not from other acts of the carrier. The very purpose of providing liquidated damages is to reduce the damages,

due to delay, to a definite sum, but, if the purpose is further to give a specified sum only in those cases where the actual damages are equal to or are less than the amount provided by the statute, and to give the shipper the election to recover all damages and waive the liquidated amount whenever his actual damages amount to more, then it would seem the statute might, in effect, allow the shipper to recover more than the compensatory damages only, for he would obviously seek to recover the amount fixed by statute when it was to his advantage, and when he would thus receive more than the actual damages he had sustained, and, on the other hand, he would resort to his common-law action for the full amount of his damages when he could show that the amount of actual damage was more than that allowed by statute. The question of election, however, is not in the case before us, since, by the wording of the statute in question, no election is provided, but the shipper is expressly allowed to recover both the stipulated amount and the actual damages suffered.

It is true that the statute in question was held to be constitutional in the case of *Sunderland Bros. Co. v. Missouri P. R. Co.*, 101 Neb. 119, but the only constitutional questions raised in that case were as to whether or not the statute imposed a burden on interstate commerce, and the questions now involved in the instant case were not raised.

The statute under consideration allows the shipper to recover both actual damages sustained by him, by reason of the delay in shipment, and in addition $1 per car for every day's delay. It is manifest then that the $1 per car is an amount that much in excess of the actual damages sustained, and that much in excess of compensation to the shipper, and must be considered in the nature of a penalty.

If the legislature had intended that the $1 should cover liquidated damages for all those injuries sustained by the shipper, due to the delay in shipment, that would

have been an unjust provision, for in some cases the price of the commodity shipped would not fluctuate in value, and very little damages, if any, would accrue, while as to other commodities the price might fluctuate greatly and delay result in large injuries to the shipper.

In other words, the damages, resulting from delay in the shipment of various commodities, is so variable with regard to the different kinds of commodities to be shipped that the amount of liquidated damages fixed at $1 could not bear any reasonable relation to the damage sustained by the shipment of each of those respective commodities, and the legislature must have intended that, in addition to the $1 to be recovered for delay, the shipper could also recover all of his actual damages sustained by reason of the delay, together with the amount provided.

It is suggested that the rule in the case of *Atchison & N. R. Co. v. Baty, supra,* is out of line with the general holding in other states. We are unable to agree with that conclusion. It is true that in other states penalties have been imposed for a violation of statutory duty, and these penalties have been, in many instances, recoverable by the individual, instead of by the state. Those states, however, do not, so far as our attention has been called, have such a constitutional provision as the one we have in this state, providing that all fines and penalties shall be appropriated exclusively to the use and support of common schools.

The cases in other jurisdictions discuss the validity of penalty statutes, as affected by general constitutional provisions, such as the requirement of due process of law and equal protection of the law, and under those constitutional provisions such penalty statutes are not prohibited.

It is further pointed out that the supreme court of Iowa has held directly contrary to the *Baty* case. *Tredway v. The S. C. & St. P. R. Co.,* 43 Ia. 527. That case holds only that a statute allowing double damages does

not deny equal protection of the laws, and would not therefore be unconstitutional on that ground. The constitutional provision involved here was not involved in the Iowa case, and the *Baty* case was not cited nor referred to.

Cairo & St. L. R. Co. v. Peoples, 92 Ill. 97, is cited as holding directly contrary to the *Baty* case. In that case the Illinois court said (p. 102): "The case of *Atchison and Nebraska Railroad Co. v. Baty,* 6 Neb. 37, cited, cannot be regarded as a controlling authority. That case seems to regard 'double damages' for stock killed or injured as purely a penalty, a proposition to which we cannot fully yield our assent. Considering double damages as penalty, the conclusion reached by the court in the case cited was inevitable, as the Constitution of that state, as the opinion declares, provides that 'all fines and penalties * * * shall be appropriated exclusively to the use and support of common schools,' and hence the decision that no private individual could recover the penalty." The court further pointed out that in Illinois there was no such constitutional provision as the one in Nebraska.

It seems clear that our former opinion, holding that the statute provides a penalty, is right, under the numerous decisions of this court, and that the opinion should be adhered to.

The motion for rehearing is therefore

OVERRULED.

ALDRICH, J., not sitting.

LETTON, J., dissenting.

The effect of the majority opinion is to leave the railroad companies free to impose demurrage charges upon the shipper for failing to unload cars seasonably, but to deprive him in many cases of any adequate remedy for the failure of the carriers to perform their duty with respect to the delivery of cars or freight. The act was passed to meet a long-felt defect in the law, and I feel

satisfied it is not in conflict with any provision of the Constitution if properly construed.

The constitutionality of reciprocal demurrage statutes has been assailed in a number of states, and they have generally been upheld, the courts generally holding that the provisions that a reasonable amount be paid by the railroad for failure to furnish or deliver cars, or by a shipper for the undue retention of cars, are reasonable regulations intended to aid the carrier against the undue retention of cars required for other shippers, and to afford the shipper relief against delay in the delivery of freight. *Yazoo & M. V. R. Co. v. Keystone Lumber Co.*, 90 Miss. 391, 13 Ann. Cas. 964, and note; *Patterson v. Missouri P. R. Co.*, 77 Kan. 236, 15 L. R. A. n. s. 733; *Hardwick Farmers Elevator Co. v. Chicago, R. I. & P. R. Co.*, 110 Minn. 25, 19 Ann. Cas. 1088.

The statute is declared unconstitutional on the authority of *Atchison & N. R. Co. v. Baty*, 6 Neb. 37. It was decided in that case that the legislative authority cannot reach the life, liberty, or property of the individual, except he is convicted of a crime, or when the sacrifice of his property is demanded by a just regard for the public welfare; and it is said that the imposition of double damages is a penalty or fine, and that "this penalty or fine is by the statute given to the party claiming damage for the accidental loss of his property, and hence the act must come in conflict with that provision of the Constitution which declares that 'all fines and penalties,' etc., 'shall be appropriated exclusively to the use and support of common schools.'"

This portion of the opinion was overruled very soon after its announcement, and judgments based upon a contrary view have many times been affirmed by this court.

There is now practically no difference of opinion among the leading courts of the country on the main proposition that the state has power to impose a penalty for a violation of a duty imposed by statute, and that

the disposition of the penalty, whether it shall go to the state, or one of its subdivisions, to a private informer, or to the person actually damaged, is entirely within the discretion of the law-making power. In *Missouri P. R. Co. v. Humes,* 115 U. S. 512, 6 Sup. Ct. Rep. 110, which concerned a like statute to that involved in the *Baty* case, the court said: "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." 8 R. C. L. (Damages) 608, sec. 153, 21 R. C. L. (Penalties) p. 206.

The *Humes* case has been repeatedly followed in the federal courts. But the question here is not whether the power to impose a penalty or a fixed sum of damages exists, but whether the penalty, by virtue of the constitutional provision quoted in the opinion, belongs to the common school fund of the state. In the *Baty* case, decided in 1877, this court so held. But in *Graham v. Kibble,* 9 Neb. 182, decided in 1879, the court, after quoting the constitutional provision, and saying it was not intended by this provision to prevent the passage of

such a statute as was involved in that case, which provided that a county officer should forfeit or pay $50 if he exacted illegal fees, said: "It may be true that such statutory allowance is much in excess of the actual loss sustained or injury done, and therefore, to the extent that it is so in its effect upon the offending officer, *is in the nature of a penalty.* But the power of the legislature to fix the maximum, or even the exact amount recoverable by a private person sustaining injury, or that shall accrue to the public in case of official delinquency, *cannot be successfully questioned.* * * * This section of the Constitution, as we understand it, *has no reference whatever to those damages, whether limited in the amount recoverable or not,* which a private person may sustain, but solely to such as, under the law of the land, are given to the public and go into the public treasury. Its object doubtless was to correct what were considered abuses in the disposition of public moneys realized from the several sources therein mentioned, and to insure their proper expenditure in the future. Its evident scope is to give direction to the distribution of particular funds belonging, under the law, to the public at large or to a particular subdivision thereof, and thereby insure an equitable distribution, viz., to the particular subdivision of the public upon whom rests the chief responsibility and expense of enforcing the criminal laws and police regulations of the people. We are aware that this view of this provision conflicts with an expression in the opinion of this court in *Atchison & N. R. Co. v. Baty,* 6 Neb. 37. To the extent, however, that it does, the law of that case should be modified."

Graham v. Kibble was followed in *Deering & Co. v. Miller,* 33 Neb. 654; *Clearwater Bank v. Kurkonski,* 45 Neb. 1; *Phœnix Ins. Co. v. McEvony,* 52 Neb. 566; *Hier v. Hutchings,* 58 Neb. 334; *Cram v. Chicago, B. & Q. R. Co.,* 84 Neb. 607; and *Smith v. Chicago, St. P., M. & O. R. Co.,* 99 Neb. 719. In *Everson v. State,* 66 Neb. 154, the provision of the Criminal Code providing that, in

entering a judgment on conviction of embezzlement, the convict shall pay a fine equal to double the amount embezzled, which fine shall operate as a judgment at law for the use of the party whose money or property has been embezzled, was upheld against the same objections as are made in this case. In *Grand Island & W. C. R. Co. v. Swinbank,* 51 Neb. 521, the decision as to double damages was followed, but it was recognized that the point that such penalties belong to the school fund had been disapproved. The *Cram* case was upheld on this point by the supreme court of the United States in *Chicago, B. & Q. R. Co. v. Cram,* 228 U. S. 70, 33 Sup. Ct. Rep. 437.

A like construction has been given to similar provisions in the constitutions of other states.

In Indiana a statute provided a penalty of $100 for the failure to transmit telegraph messages as therein provided, to be recovered by the party aggrieved in a civil action. In *Western Union Telegraph Co. v. Ferguson,* 157 Ind. 37, the statute was assailed because the Constitution gave all fines and forfeitures to the school funds of the state. The court said, among other things: "The first objection has been held to be ill-founded in *Burgh v. State,* 108 Ind. 132; *Toledo, St. L. & K. C. R. Co. v. Stephenson,* 131 Ind. 203; *State v. Indiana & I. S. R. Co.,* 133 Ind. 69, 18 L. R. A. 502; and *Judy v. Thompson,* 156 Ind. 533. * * * The giving to an aggrieved party a civil right of action for fixed punitive damages against administrators for malfeasance, against public officers for extortion, against mortgagees for failing after demand to release mortgages on the public records, against telegraph companies for violation of statutory duties, and the like, does not deprive the school fund of any of its sources of revenue."

In North Carolina the statute provided that a railroad company that allowed freight to remain unshipped for more than five days shall forfeit and pay the sum of $25 each day said freight remains unshipped to any person

suing for same. In passing upon the argument that the statute was void because by the Constitution all penalties and forfeitures belonged to the school fund, the court said: "There is a distinction between those penalties that accrue to the state, and those that are given to the person aggrieved, or such as may sue for the same, and no doubt this distinction was in the contemplation of the framers of the Constitution when they adopted that section. * * * If the penalty sought to be recovered in this action belongs to the county school fund, then all penalties must go the same way, and hereafter, the plaintiff who amerces a sheriff in the sum of one hundred dollars for not serving his process, will collect it for the benefit of the school fund of his county. That cannot be the meaning of the Constitution." *Katzenstein v. Raleigh & G. R. Co.*, 84 N. Car. 688, 693. See, also, *Branch v. Wilmington & W. R. Co.*, 77 N. Car. 347; *Keeter v. Wilmington & W. R. Co.*, 86 N. Car. 346; *Whitehead & Stokes v. Wilmington & W. R. Co.*, 87 N. Car. 255; *McGowan v. Wilmington & W. R. Co.*, 95 N. Car. 417; *McGwigan v. Wilmington & W. R. Co.*, 95 N. Car. 428; *Williams v. Hodges*, 101 N. Car. 300; *Cole v. Laws*, 104 N. Car. 651.

In Missouri, under similar constitutional provisions for double damages, it was held that "both of these provisions refer only to such fines, penalties, and forfeitures as the legislature might provide should accrue to the state." The opinion says this section clearly refers to penalties accruing to the public, and not to penalties recovered by private persons for their own use. *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56; *State v. Wabash, St. L. & P. R. Co.*, 89 Mo. 562.

The statute here is declared void because it provides for both actual damages and a fixed sum as a penalty. No statute should be declared void, if a reasonable construction will make it valid.

Even if the court adheres to the main point decided in the *Baty* case, which I am convinced was erroneous, in

the *Kurkonski* case, in *Deering & Co. v. Miller, supra*, and in *Smith v. Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719, we held that the action must be either for the actual damages, or for the penalty or liquidated damages provided for by the statute, and it is generally held that, where the same facts that would make out a case for damages under the statute would also establish a case for damages at common law, the petition should show in some form that the action is based upon the statute; otherwise, it will be treated as a common-law action. *Montgomery v. Edwards*, 45 Vt. 75; 17 C. J. 1007, sec. 310, note 15.

I feel satisfied that there is no constitutional provision which prevents the legislature from imposing a reasonable penalty for the violation of a statute regulating common carriers, and providing that the proceeds of the penalty may go to the party injured.

MICHAEL KRUMM, APPELLEE, V. LIZZIE PILLARD ET AL., APPELLANTS.

FILED MARCH 13, 1920. No. 20996.

1. **Jury: SUIT TO QUIET TITLE.** An action to quiet title based upon plaintiff's adverse possession for statutory period calls for equitable relief, and neither party is entitled as a matter of right to demand a jury to pass upon the facts.
2. **Evidence** examined, and *held* sufficient to sustain the findings and decree.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

R. H. Hagelin, for appellants.

Meier & Meier, contra.

DAY, J.

At the time of the commencement of this action, the then plaintiff, Michael Krumm, was the record owner of

the W. ½ of the N. W. ¼ of section 29, town 8, range 6, Lancaster county, Nebraska, and the defendant Lizzie Pillard was the record owner of the W. ½ of the S. W. ¼ of the same section. A controversy arose between the parties as to whether a fence which had theretofore been constructed as a division line fence between said respective parties was on the correct boundary line. The dispute was carried to the point where the defendant undertook to remove the fence and place it back north a few feet to a point she conceived to be the true line, and which probably was the correct boundary. The plaintiff thereupon brought this action alleging in substance that for 35 years he had owned the W. ½ of the N. W. ¼ above described, together with lands adjacent thereto, and particularly all land in said section situated between the south line of the W. ½ of the N. W. ¼ of said section and the old established fence along the north end of the W. ½ of the S. W. ¼ of said section; that the plaintiff had, for more than 35 years last past, claimed and asserted the rights of ownership and possession thereof, continuously, openly, notoriously, adversely and exclusively against all persons whomsoever; that the fence as aforesaid was established by the plaintiff and one Simon Wunderlichs more than 30 years prior to the bringing of the action. The plaintiff further alleged that the defendants were seeking to interfere with his right of ownership and possession; that the defendants are threatening to take possession of portions of said land; that they have sought to have surveys made and stakes driven and holes dug, and to plow up said fence, and in other ways to trespass and encroach upon the lands of the plaintiff. The plaintiff prayed for an injunction against the defendants from in any wise molesting or interfering with him in the peaceable occupancy of said land, and for a decree quieting the title to all of said lands on the north side of said old established fence, and for such other and further relief as the court might find proper.

Before the defendants filed an answer to the petition, a motion was filed in their behalf requesting that the case be transferred to a law docket for trial by jury, for the reason that the questions of fact to be tried involved the title to real estate. This motion was overruled by the court. The plaintiff, Michael Krumm, having died, the case was revived in the name of Augusta Krumm, executrix. The defendants then filed an answer alleging in substance that Lizzie Pillard was the owner of the W. ½ of the S. W. ¼ of said section, and that she had owned said land since 1912; that during said period Michael Krumm and his children had from time to time removed said division fence and placed it further south upon the land of the defendant Lizzie Pillard. The defendants further alleged that at no time did the plaintiff claim to be the owner of the strip of land lying north of said fence, and denied that Michael Krumm for 35 years, or for any length of time, had openly, continuously, notoriously, adversely and exclusively claimed the rights of ownership and possession of said strip of land. The defendants prayed that the title to the strip of ground lying between the fence and the south line of the Krumm tract be quieted and confirmed in the defendant Lizzie Pillard, and that the said plaintiff be forever enjoined from in any wise molesting or interfering with the defendant Lizzie Pillard's peaceable and lawful ownership of said strip of ground, and for such other and further relief as the equity of the cause might require. Upon the issues thus presented, and the testimony, the district court entered a decree in favor of the plaintiff, and established the division line between said properties as near as practicable along the line of the old fence as it originally stood. The line the court established by the decree does not give to the plaintiff the small encroachments on the defendant's property made during the ownership of Lizzie Pillard, occasioned by the removal of the fence to the southward from time to time as repairs

were made on the fence; neither does the decree follow the precise line of the old fence, but does follow it for practical purposes. The original fence varied somewhat from a straight line between given points along its course, and the effect of the decree is to straighten out these kinks. In this respect Lizzie Pillard has no ground to complain, for the straightening of the line took none of her land. From this decree, the defendants have appealed.

While this case is before this court for trial *de novo*, the defendants have particularly challenged attention to two assignments of error: First, that the court erred in overruling the defendants' motion to have the cause transferred to a law docket for trial by a jury; and, second, that the judgment and decree is contrary to the evidence, and is not supported by the evidence.

With respect to the first contention, it cannot be successfully claimed that the defendants were deprived of any constitutional right by the ruling of the court. True, our Constitution (article I, sec. 6) provides that the right of trial by a jury shall remain inviolate, but this does not mean that in all cases a party has a right to have the facts of his case determined by a jury. It is now well recognized that this provision of the Constitution preserves the right to a jury trial as that right existed at the time it was adopted, but it does not create or extend such right. *Sharmer v. McIntosh*, 43 Neb. 509. Our statutory provisions relating to this subject provide: "Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury." Rev. St. 1913, sec. 7843. "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code." Rev. St. 1913, sec. 7844. The decisions of our court on this subject have established a pretty clear line of demarcation between these two classes of cases. When the action is one purely legal in its nature, the rule is that either party

ordinarily, as a matter of right, is entitled to demand a jury trial. *Olsen v. Marquis*, 88 Neb. 610; *Lett v. Hammond*, 59 Neb. 339. When the cause is for equitable relief, a jury cannot be demanded as a matter of right by either party to try any issue arising in the case. *Sharmer v. McIntosh*, 43 Neb. 509.

The only question then to be determined is whether the present action is to be regarded as a purely law action, or is it one calling for the exercise of the equity power of the court. This must be determined by the allegations and prayer of the petition. The petition and prayer clearly indicate the action to be one to quiet title, coupled with it a prayer that the defendants be enjoined from interfering with the plaintiff's possession and enjoyment. It is true the plaintiff bases his title in a claim of adverse possession, but this related to the proof by which he claimed ownership, rather than the fact of ownership. It was no necessary part of his cause of action. His cause of action could have rested on an allegation of ownership, which could be established by proof of adverse possession or by a record title. If the object which the plaintiff had in view by this suit could be construed to be an action in ejectment, then it would clearly be an action at law, and the defendant would be entitled to a jury trial. The basis for an action in ejectment is the unlawful possession of the premises by the defendant, but in this case the plaintiff was in possession of the premises, and hence there was no basis for an action in ejectment. The action being one to quiet title, coupled with an application for injunction, presents a case calling for equitable relief, notwithstanding the fact that the plaintiff's title is based on a claim of adverse possession. After the defendants filed their answer, no application was made for a jury trial under the issues presented by the answer, and even if it were conceded that the answer presented an issue triable to the jury, which we are of the opinion that it did not, they waived it by not again asking for a jury trial.

The second assignment of error involves a consideration of the evidence in the case. It would be of little value to the litigants, and none to the profession, to go into anything like a complete analysis of the evidence. Suffice it to say that some 30 years ago one Simon Wunderlichs, a predecessor in title of the defendant, constructed the fence in question. At the time, he made no survey, but followed his best judgment as to where the line was, based upon fences elsewhere constructed in the section of land, and such monuments as he was able to locate. Both plaintiff and Wunderlichs assumed the fence marked the true boundary of their respective farms, and no question as to boundary was ever raised between them. The plaintiff farmed and used all of this strip continually during all these years, and by outward acts, so far as outward acts can do so, proclaimed his ownership and claim to the land. It was not necessary that he should give notice of his intention otherwise than as he did. *Horbach v. Miller,* 4 Neb. 31; *City of Florence v. White,* 50 Neb. 516. Appellants recognize the force of this rule, and seek to avoid its effect by arguing that this presumption arising from the outward manifestation of ownership is overcome by the declaration of the party in possession that his holding is not adverse to the true owner. This is a correct statement as a principle, but in our judgment the facts of this case do not call for the application of this rule. The plaintiff's title by adverse possession was complete long before Mrs. Pillard acquired the title. During her occupancy, the plaintiff moved a small portion of the fence to the southward, and this encroachment brought forth a remonstrance from Mrs. Pillard. At that time neither she nor the plaintiff knew that the fence did not mark the true boundary. Witnesses for the defendant testified that the plaintiff stated that he did not want any of the defendant's land, that all he wanted was his own, and that he would move the fence back. Under all the circumstances, we cannot but believe that

what the plaintiff had in mind in his statement was to move the fence back from the recent encroachment. The survey disclosed that the Wunderlichs fence was not on the true boundary. At the extreme west end it was six-tenths of a foot north of the correct line, and at the extreme east end was south of the true boundary 6.8 feet. A very slight calculation discloses that the amount of land in this strip is less than one-twelfth of an acre.

From an examination of the entire testimony, we are convinced that the plaintiff has been in the open, notorious, exclusive, continuous, adverse possession of the strip of land in question for more than the statutory period of 10 years, and that he was entitled to the decree granted. The decree of the district court did not include the small portions which were covered by the more recent encroachments of the plaintiff upon the defendant's land.

The decree of the district court is

AFFIRMED.

CORNISH, J., dissenting.

When, as here, the person occupying another's land never intended to assert any but his legal rights, and the owner of the land also supposed that such was not his intention, I see no good reason for calling such possession adverse possession. It does not seem to me that it can be called adverse, because the occupant, as an honest man, would always be willing to change his fence if it was not upon the dividing line. The true owner is entitled to some notice that the possession is actually adverse. I am of opinion that our former holdings to the contrary should be reversed, at least in cases where no right, based upon estoppel, has arisen.

MARK SPANOGLE, APPELLANT, V. MAPLE GROVE LAND & LIVE STOCK COMPANY, APPELLEE.

FILED MARCH 13, 1920. No. 21001.

1. **Frauds, Statute of:** CONTRACT FOR SALE OF LAND. A contract of an agent in the name of his principal, for the sale of land, is void unless the authority of the agent to make the sale is in writing signed by the principal.
2. **Brokers:** CONTRACT FOR SALE OF LAND. Authority of an agent in writing to sell specificially described land of his principal will not be extended by implication to include other land not described.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed.*

C. G. Perry, for appellant.

Wright, Mothersead & York, contra.

DAY, J.

The plaintiff brought this action to compel specific performance of an alleged land contract for the sale of land situated in Morrill county. The district court found generally for the defendant and dismissed the plaintiff's cause of action. The plaintiff brings the case here on appeal.

The petition alleged in substance the corporate capacity of the defendant; that prior to January 15, 1917, the defendant had authorized in writing one Frank N. Hunt to negotiate a sale for the defendant of the S. W. ¼ of section 31, township 29, range 49, in Morrill county, Nebraska, then owned by the defendant; that the plaintiff entered into negotiations with the defendant's agent, Frank N. Hunt, which culminated in a contract of sale, and thereupon the plaintiff gave a check to said Hunt for $50 as earnest money and received from him a receipt and contract, as follows: "$50. Bridgeport, Neb. January 15, 1917. Received of Mark Spanogle $50 to apply on the purchase price of the S. W. ¼ of section 31,

township 19, range 50, in Morrill county, this day sold him for $1,600; the balance of the purchase price to be paid upon the examination of an abstract of title showing the tract to be free from incumbrance, and the delivery of a warranty deed in blank conveying the same to him. Maple Grove Land & Live Stock Co., by Frank N. Hunt, Agent."

The plaintiff alleged his willingness and ability to perform the contract on his part, and the refusal of the defendant to carry out the contract on its part. The defendant denied that said Frank N. Hunt was at the time acting as the agent of the defendant, and alleged that he was acting as the plaintiff's agent. The answer further alleged "that the facts stated in plaintiff's petition are not sufficient to constitute a cause of action against this answering defendant." To sustain the issue of the agency of Hunt, the plaintiff offered in evidence Exhibit 1, which, omitting parts not material to the present inquiry, is as follows: "September 27, 1916. I hereby employ Frank N. Hunt sole and exclusive agent to sell or exchange my farm of 160 acres, situated S. W. ¼, of section 31, township 20, range 49, county of Morrill. * * * Price $15 per acre, commission to be five (5) per cent. This agreement to run three months from date, and thereafter until fifteen days' written notice is given of withdrawal from market. I also agree to give warranty deed and abstract showing clear and merchantable title to the above described land, within fifteen days after sale is effected. Owner, Maple Grove Land & Live Stock Co., by W. J. Coad. Agent, Frank N. Hunt."

The witness Frank N. Hunt, called on behalf of plaintiff, testified that prior to February 1 no notice of the revocation of the contract of agency (Exhibit 1) had ever been received by him, and that certain telegrams in evidence were sent to the defendant, "pursuant to that contract." The plaintiff testified, with relation to the receipt and contract hereinbefore set out (Exhibit 6): "That is a receipt for $50 for the purchase of the

S. W. ¼ of 31-19-50, in Morrill county, Nebraska." "It was given to (by) Mr. Frank Hunt." The plaintiff testified that he gave the check to Hunt, and Hunt gave him the receipt. To make out a case of specific performance for the sale of land, to avoid the effect of the statute of frauds, it was necessary for the plaintiff to show that Hunt was authorized in writing by the defendant to make the sale; and it was also necessary to show that plaintiff had a contract for the sale of the land, signed by the defendant or his agent thereunto authorized in writing. That the plaintiff recognized this is apparent from the parts of the testimony we have quoted. The contract of agency above quoted is authority in Hunt to bind the defendant for the sale of the S. W. ¼ of section 31, township 20, range 49, but such authority could not be extended by implication to authorize him to bind his principal by contract to sell other and different land. The contract which is the basis of the plaintiff's suit and the land which he says he purchased is the S. W. ¼ section of 31, township 19, range 50. The situation suggests the possibility of a mistake in the records before us, but it is properly certified as correct, and we are not at liberty to say that it is a typographical error. We can only pass upon the record before us. If the contract between the plaintiff and defendant, as disclosed by the writing, does not reflect the real intent of the parties, the time and place to have it corrected was in the district court, by a plea for reformation.

A contract of an agent in the name of his principal, for the sale of land, is void under the statute of frauds of this state, unless the authority of the agent to make the sale is in writing signed by the principal. *O'Shea v. Rice,* 49 Neb. 893. This same principle has been recognized by this court in the following cases: *Morgan v. Bergen,* 3 Neb. 209; *Soward v. Moss,* 59 Neb. 71; *Frahm v. Metcalf,* 75 Neb. 241; *Ross v. Craven,* 84 Neb. 520.

Other questions are considered in the briefs, relating especially to the price at which Hunt was authorized to

sell the land under his agency contract, as modified by subsequent correspondence; but, as there is a failure to establish authority in Hunt to sell the land described in plaintiff's receipt and contract, we deem it unnecessary to pass upon those questions.

The decree of the district court was right, and the judgment is

AFFIRMED.

LETTON, J., not sitting.

PEARL E. DAVIS, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 13, 1920. No. 20818.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISK. Where, in a railroad repair shop, the master has prescribed no particular means whereby the workmen shall climb upon locomotives undergoing repair, but the workmen, when required to take off or replace parts of such engines, have always climbed thereon by means of projecting parts of the engine and cab, an experienced workman, accustomed repeatedly each day to climb upon engines by the use of such means, must rely upon his own judgment in selecting handholds, and assumes the risk thereof.

2. ———: ———: NEGLIGENCE OF FELLOW SERVANT. Under the federal employers' liability act a railroad company is liable to an injured employee for negligence causing such injury, although such negligence is attributable to a fellow servant.

3. ———: ———: ACTIONABLE NEGLIGENCE. Where an experienced workman in a railroad repair shop, in replacing a part of a dismantled locomotive, uses as a handhold in climbing thereon a loose pipe placed or stuck upon a projecting bolt, mistaking it for a stationary part of the engine, and falls and is injured by reason of its giving way, the placing of the loose pipe in such position by a fellow servant of the injured workman does not constitute actionable negligence, where the circumstances are such as to require the injured workman to rely upon his own judgment in the means employed in climbing upon the engine, and where the risk of injury therefrom has been assumed by him.

4. ———: ———: DUTY OF MASTER. A master is not an insurer of his servant's safety, but is required to use ordinary care in providing him with a safe place to work. When the master provides sufficient light for ordinary purposes, and, in addition to the general lighting of the premises, provides portable individual lights for the use of his servants, when, in their judgment, such lights are needed, the master's duty in that regard has been fulfilled.

5. ———: ———: APPLIANCES. Where an experienced workman, under circumstances which require him to rely upon his own judgment in selecting the means of climbing upon an engine, is injured by the giving way of a loose pipe, which, on account of the dimness of the light, he has mistaken for a firm handhold, the sufficiency of the light for his purpose enters into the exercise of his judgment; and, where it appears that more light was available if he had called for it, lack of sufficient light cannot be made the basis of recovery in an action against the master for alleged negligence.

6. **Negligence:** ACTION: DIRECTION OF VERDICT. When the evidence, viewed in the light most favorable to the plaintiff, fails to establish actionable negligence, it is the duty of the trial court to direct a verdict for the defendant.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed.*

Wilmer B. Comstock, for appellant.

Byron Clark, J. L. Root and *Strode & Beghtol, contra.*

DORSEY, C.

Action for damages for personal injuries under the federal employers' liability law (35 U. S. St. at Large, ch. 149, p. 65) by a mechanic employed in the defendant's repair shops. At the close of plaintiff's evidence, and again after both parties had rested, the defendant moved for an instructed verdict. The trial court sustained the motion and directed a verdict for the defendant. From the judgment entered thereon the plaintiff appeals.

The plaintiff was, as he described it in his testimony, a steam-pipe fitter's helper. His work consisted of putting in steam-pipes on locomotive engines, putting on throttles and other parts. His work was then in the wrecking department, and in the course thereof he, with

other workmen under the direction of a foreman, would strip the engine and take off the throttle and other parts, put them temporarily on racks or benches, and afterwards replace them on the locomotives. It was frequently his duty to climb upon the engines and in and out of engine cabs. Prior to the accident he had worked in the defendant's blacksmith shop about six or seven months, and in the wrecking department of the repair shop about two months.

About 8 o'clock in the evening of November 23, 1916, he was working upon a dismantled locomotive and was ordered by the foreman to assist in putting in place the throttle lever. This was to be attached to the rear end of the boiler, where it projects under the roof of the engine cab. It was necessary for him to climb into the cab in order to be in position to do this work. The only means of climbing, as he said, was to take hold of the edge of the cab, place his feet upon such parts of the engine as would furnish a foot-hold, and grasp and pull himself up by such projecting parts as would afford a handhold. The plaintiff testified that he climbed upon the platform below the firebox, three or four feet from the floor, and reached for what he supposed was the throttle stem (a rod which extends out about a foot from the rear end of the boiler and to which the throttle lever was to be attached). He claims, however, that he got hold of a loose piece of pipe about a half-inch in diameter, which had been placed or stuck upon a projecting bolt in such manner as to extend out from the rear end of the boiler, and which he mistook for the throttle stem because it was too dark for him to distinguish accurately. As he grasped the pipe it gave way and slipped off, causing plaintiff to lose his balance and fall backward, whereby he fell to the floor and was injured.

The testimony of the plaintiff with regard to the lighting in the room was in substance as follows: There were arc lights hung near the ceiling which, because of the roof of the engine cab, did not throw light inside there-

of. There was a torch near the front end of the cab three or four feet too far forward to throw light upon the end of the boiler where plaintiff was to adjust the throttle. He did not particularly notice the absence of the light in the room when he went to work that night and made no complaint about it. There was light enough, he said, for him to see the projecting object which he mistook for the throttle stem, but not light enough to tell what it was. The room was about as well lighted as on other nights when he had worked there, perhaps a little darker than usual. The defendant provided extension lights attached to a cord, which could be plugged in below the engine for the workmen to use when needed. He had seen others use them, but had never used nor asked for one himself.

Several witnesses for the defendant who were working in the same room at the time disputed the plaintiff as to the lighting. They testified that there was a separate electric light inside the cab shining directly upon the rear end of the boiler. Plaintiff testified that as he fell he threw over his head the pipe which he had grasped by mistake and which he mistook for the throttle stem. No witness except the plaintiff saw this pipe, according to their testimony. The plaintiff testified that after the accident he told the foreman and some of the other workmen about this pipe and showed them where it had been stuck onto the boiler. This was denied by the foreman and the other workmen who testified.

This case is governed by the federal employers' liability act. In order to recover, the plaintiff must show that his injuries were caused by some act of negligence on the part of the defendant. The allegations of negligence, upon which he must rely, as disclosed by the pleadings and evidence, are (1) that the placing of the loose pipe on the end of the projecting bolt, presumably by a fellow workman, so as to resemble the throttle stem, and thus mislead the plaintiff into using it as a handhold, was actionable negligence; or (2) that the lights

furnished by the defendant in the workroom were so insufficient as to constitute a failure on its part to fulfil its duty of furnishing the plaintiff with a safe place to work.

The answer of the defendant consisted of a general denial of negligence, and a plea that plaintiff had assumed the risk.

In determining whether the trial court was justified in withdrawing the case from the jury and directing a verdict for defendant, the question is whether the evidence, interpreted in the light most favorable to the plaintiff, was sufficient to make out a case of actionable negligence. Unless it can be said, as a matter of law, that no actionable negligence was made out, the issue should have been submitted to the jury. We believe the trial court was right in holding that no actionable negligence was shown.

In reaching this conclusion we are mindful of the fact that under the federal law the railroad company is liable even if the plaintiff's injuries were caused by the negligence of a fellow servant. If the placing of the loose piece of pipe on the bolt or stud, as testified to by plaintiff, constituted negligence causing his injury, it was the negligence of some fellow servant of plaintiff who placed it there, and for this the defendant would be just as liable as if it had been placed there by a vice-principal. But we cannot assume that it was negligence simply because it caused, or may have caused, the accident. If it was included within the scope of the risks assumed by the plaintiff in the usual and ordinary course of his employment, it could not constitute actionable negligence. If he was subjected to no greater risk than those just indicated, his employer was not negligent. Did the placing of the piece of pipe where the plaintiff said he took hold of it create an extraordinary danger not normally incident to his employment? Or was it one of those dangers that by the use of ordinary care would have been known to a workman of his age, experience and understanding?

The plaintiff was not obliged to use the piece of pipe, or, as he supposed, the throttle stem, as a handhold; there was no particular and exclusive method of climbing upon the engine provided by his employer. The plaintiff himself says: "You had to grab hold of anything you could get hold of to get up in there," and "You get in and out the best way you could." He had climbed in and out of the cab many times each day, and was perfectly familiar with the construction and parts of the engine that he worked on.

In *La Londe v. Soderberg*, 96 Neb. 118, which was a case wherein a carpenter was injured in the erection of a building, the employer "made no attempt to prescribe the manner or furnish the means by which the men should ascend or descend to or from the attic of the building. He had left it with the plaintiff himself to determine how he should climb up and down." In that case the workman was injured by reason of taking hold of a loose board in descending from the scaffold, and it was held that the workman "is required to use such means in climbing up and descending from such building as his own judgment and convenience may suggest." We think that principle applies to and is decisive of the question under consideration. The plaintiff was required to use his own judgment in selecting handholds, and ordinary care on his part required him to test the strength of the handhold which he selected before throwing his weight on it. The danger of its giving way was, therefore, a risk assumed by him, and actionable negligence on the defendant's part could not be predicated upon it.

The question remains whether the room was so defectively lighted as to be an unsafe place to work. We think the evidence is conclusive that there was sufficient light to exonerate the defendant from any charge of negligence in that regard. The defendant was not required to keep every part of the room and every object in the room so brightly illuminated as to exclude all possibility of accident, only to exercise reasonable and ordi-

nary care with respect to the lighting of its workroom, in order that the safety of its employees might not be imperiled by lack of reasonable provision for lighting.

The plaintiff's testimony discloses that the room was lighted by electric arc lamps, and that there were special facilities for individual lights equipped with extension cords for those workmen who needed them. There was light enough for the plaintiff to see the projecting pipe which he mistook for the throttle stem. The law required him to rely upon his own judgment in depending upon it as a handhold in climbing into the cab. The sufficiency of the lighting for this purpose was one of the elements that entered into the exercise of his judgment. The defendant was not an insurer of his safety, and the obligation to use reasonable care for the safety of its workmen did not require it to have every part of the engine that he was using as a handhold or a foothold so brightly lighted that an error of judgment on his part would be impossible, especially in view of the undisputed fact that more light was available, if, in his judgment, it was necessary. It was not a case where he had asked for better light and had been refused.

The rule that we think applies in a situation such as the record of this case presents is well stated in *Schoultz v. Eckardt Mfg. Co.*, 112 La. 568, 104 Am. St. Rep. 452: "The master is not bound to keep his premises so lighted that any and all repair work may be done without the necessity of procuring extra light. When plaintiff undertook to do this repair work, it was for him to know whether he had enough light to do it in, and to procure additional light if needed. He was not a green hand, uninformed of the nature of the work he was called upon to do, but he was the person on his floor supposedly best informed in that regard."

For the reasons stated, we think the trial court was right in holding, as a matter of law, that no actionable negligence had been proved, and we recommend that the judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

JOHN E. BAIRD, APPELLEE, V. UNION MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 17, 1920. No. 20529.

Tender. "A tender, in order to be effectual, must be absolute and unconditional." *Schrandt v. Young*, 62 Neb. 254.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Judgment of reversal adhered to as modified.*

Hainer, Craft & Lane, for appellant.

Lincoln Frost, contra.

PER CURIAM. Motion to modify judgment. Former opinion reported in 103 Neb. 609.

Defendant tendered to plaintiff $3,112.20, and demanded a receipt in full and the execution of a formal release and return of a policy. In view of the decisions, the tender by defendant was conditional and was therefore vitiated. *Schrandt v. Young*, 62 Neb. 254; *Wilkins v. Redding*, 70 Neb. 182; *Parker v. Supreme Tent, K. M. O. W.*, 191 Mo. App. 508; 38 Cyc. 154.

Our former judgment of reversal is therefore modified to permit a recovery of interest, costs and attorney's fees by plaintiff. As modified herein, our former judgment of reversal is adhered to.

JUDGMENT OF REVERSAL ADHERED TO AS MODIFIED.

ROBERT S. KING, APPELLEE, v. W. W. DAY, APPELLANT.

FILED MARCH 27, 1920. No. 20678.

1. **Appeal:** REFUSAL OF INSTRUCTION. The refusal to give a requested instruction is not error, where the same matter is covered in substance by an instruction given by the court on its own motion.
2. **Corporations:** SALE OF STOCK: WARRANTY. Contract of sale of all of the capital stock of an oil company contained a warranty that the company owned a certain number of steel barrels, without specifying kind, quality, or value. *Held*, that the warranty was too indefinite to permit a recovery for a shortage in the number of barrels, there being no competent extraneous evidence to explain it.
3. ———: ———: ———: BREACH: MEASURE OF DAMAGES. In a suit for breach of warranties in the sale of all of the issued stock of a corporation, the measure of plaintiff's recovery is the difference between what such capital stock would have been worth had there been no breach of warranty and what it was actually worth; and the amount of recovery is not affected by a provision in the contract requiring the vendor "forthwith to subscribe and pay for 100 shares of stock of said company," where it appears that the intention of the parties was that the subscription should be for unissued capital stock.
4. **Guaranty.** A provision in a contract warranting that certain accounts receivable are "good and collectible, and will be paid to the said company within three months from date hereof, and said first party agrees to pay the said company promptly such a sum as shall equal the deficiency of the payment," is a guaranty of payment.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed on condition.*

Strode & Beghtol, for appellant.

Burkett, Wilson, Brown & Wilson, contra.

MORRISSEY, C. J.

This is an action for breach of contract. The original judgment was reversed and the cause remanded by this court in *King v. Day*, 101 Neb. 346. On a retrial, plain-

tiff recovered a judgment for $4,990.50, from which defendant appeals.

Defendant was the owner of all of the stock of the State Oil Company, a Nebraska corporation, which he sold to plaintiff. As part of the agreement, he "guaranteed" that the corporation had merchandise on hand of the value of $6,797.37; that it owned 1,650 steel barrels; that the debts of the company did not exceed $21,950.75; and that the accounts receivable amounted to $12,288.24, all of which would be paid in three months' time. Plaintiff claimed damages for breach of these warranties in the sum of $12,986.28. The jury allowed him $540 for shortage in the number of barrels; $2,204.50 for excess of indebtedness over the amount guaranteed in the contract; and $2,246 for deficiency in the amount of accounts receivable.

The first question to consider is the refusal of the trial court to give instruction No. 2, requested by defendant. The questions presented by this instruction were covered by instructions given by the court on its own motion, and by special interrogatory No. 1. The failure to give a requested instruction cannot be complained of as error, where the same matter is covered in substance by an instruction given by the trial court on its own motion.

Complaint is made of the court's instruction relative to the barrel shortage, and the refusal to give defendant's instruction on this point. It is unnecessary to discuss defendant's contention, because we are convinced this issue ought not to have been submitted to the jury. By the terms of the contract, defendant warranted that "there are in stock and in the field belonging to the company 1,650 steel barrels." The record indicates that various kinds and grades of steel barrels were used in the business in which this corporation was engaged. The parties made no specification as to condition, quality, or value in their agreement, and we are pointed to no competent evidence from which the jury could fix plaintiff's damage because of any shortage in the number of bar-

rels. The item of $540 allowed for such shortage cannot be permitted to stand.

The next question presented is the measure of plaintiff's recovery. The jury were instructed that, if they found in favor of plaintiff, the measure of his damage would be the difference between what the capital stock of the State Oil Company would have been worth had there been no breach of warranty and the amount which it was actually worth. Defendant attacks this instruction because of a provision in the contract requiring him "forthwith to subscribe and pay for 100 shares of stock of said company at the par value thereof of $10,000," which he claims constituted, in effect, an immediate repurchase of part of the stock of the corporation, and left plaintiff only a proportional interest, with no right to recover damages on the basis of the entire capital stock. The evidence shows, however, that all of the existing capital stock was transferred to plaintiff and paid for, and that thereafter defendant and plaintiff each subscribed for $10,000 worth of unissued stock. The use of the term "subscribe" is itself indicative that this was the intention of the parties. The court gave the jury the proper rule on which to determine the damages.

The last assignment of error which we need to consider is the giving of instruction No. 8, on the issue of accounts receivable. Under the contract, defendant warranted that the accounts receivable amounted to $12,288.24; "that said bills and accounts are good and collectible, and will be paid to the said company within three months from date hereof, and said first party agrees to pay the said company promptly such a sum as shall equal the deficiency of the payment, or the difference between the actual payment made upon said bills and accounts, and the sum, as aforesaid, $12,288.24." The court instructed the jury that this was an unrestricted guaranty which bound defendant regardless of any diligence in collection, but it placed the burden, however, upon plaintiff of establishing by a preponderance of the

evidence that the accounts for which he sought credit were worthless and uncollectible. Defendant contends that the guaranty was simply one of collection. The language of the contract supports the theory of the trial court that it was a guaranty of payment, and the qualifying clause in the instruction requiring plaintiff to show the uncollectibility of the accounts gave defendant a more favorable construction of the instrument than he was entitled to, and he cannot be heard to complain of it.

Incidental complaints are made of the insufficiency of the evidence on various points, but the conflict in the record as a whole is such that we do not feel warranted in disturbing the judgment except as to the item of $540 allowed for barrel shortage, previously mentioned. If plaintiff files in this court a remittitur for $540 within 30 days, the judgment will be affirmed; otherwise it will be reversed and a new trial granted.

AFFIRMED ON CONDITION.

DAY, J., not sitting.

BENJAMIN MEYERS V. STATE OF NEBRASKA.

FILED MARCH 27, 1920. No. 21186.

1. **Criminal Law: PRELIMINARY HEARING.** Under section 9068, Rev. St. 1913, persons accused of crime, except fugitives from justice, are guaranteed the right of preliminary hearing, but this right may be waived.

2. **———: ———: WAIVER.** "It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information. Such objection must be raised before going to trial by motion to quash the information or by plea in abatement." *Coffield v. State*, 44 Neb. 417.

3. **Information: SURPLUSAGE.** Surplus matter in an information for larceny which describes the manner of entering a building, from which it is alleged the property was stolen, does not necessarily change the character of the charge, or render the information defective.

4. **Larceny: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* to support the verdict.

ERROR to the district court for Cuming county: ANSON A. WELCH, JUDGE. *Affirmed.*

Barnhart & Stewart, for plaintiff in error.

Clarence A. Davis, Attorney General, and *John B. Barnes, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction for grand larceny. The first information filed fixed the time of the commission of the crime at an impossible date. Defendant was arraigned and entered a plea of not guilty. A jury was then impanelled and sworn, but before any testimony was offered the county attorney asked and was given leave to file an amended information, in order to allege the true date. The amended information appears to have been filed instanter. Defendant demanded "the statutory 24 hours for examination of the information as amended that he may determine what witnesses are necessary to meet the charge made in the information as now amended." The request was granted. The following day, defendant was duly arraigned on the amended information, and, when asked by the court to plead thereto, stood mute, and the court thereupon entered a plea of not guilty. No motion to quash, plea in bar, or plea in abatement was filed.

It is claimed that the court was without jurisdiction to proceed with the trial without having accorded defendant a preliminary examination on the amended information. Persons accused of crime, except fugitives from justice, are guaranteed the right of preliminary hearing, but this right may be waived. Section 9068, Rev. St. 1913. "It is too late after verdict to raise the objection that a preliminary examination has not been had for the crime charged in the information. Such objection must be raised before going to trial by motion

to quash the information or by plea in abatement." *Coffield v. State*, 44 Neb. 417.

It is claimed that the amended information does not properly lay the venue, nor fix the time of the commission of the larceny. It contains surplus matter to the effect that defendant broke and entered the building where the property stolen was situated. This was unnecessary to sustain the charge of larceny, and may have been inserted with the view of charging both larceny and burglary. But the statement as to the building where the property was stored does not change the character of the information, nor make it defective as wanting in definiteness as to time or place.

By instruction No. 1, given by the court on its own motion, the court, after stating the substance of the information, told the jury: "This information at law charges the defendant with the crime of larceny, but does not charge him with the crime of burglary." This instruction was proper in view of the information filed.

The remaining assignment calling for consideration is the insufficiency of the evidence to sustain the verdict. A review of the evidence will add nothing to the law of the state. It has been examined by the court and found amply sufficient to sustain the verdict. The judgment is

AFFIRMED.

LETTON and DAY, JJ., not sitting.

FLOYD FULLER, APPELLANT, V. WILLIAM T. FENTON, WARDEN, APPELLEE.

FILED MARCH 27, 1920. No. 21136.

1. **Habeas Corpus:** LIMITATION OF INQUIRY. "The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. If the court had jurisdiction of the defendant and authority to try the charge against him, its action can be assailed only in a direct proceeding." *McCarty v. Hopkins*, 61 Neb. 550.

2. ———: ———. Where, on a charge of murder in the first degree, the accused, after being fully informed of the nature of the plea and of the penalty which may be imposed, and having the advice of his counsel, pleads guilty to murder in the second degree, which plea is accepted by the state, and he is accorded the right to make a statement before sentence, he cannot thereafter successfully maintain habeas corpus on the ground that the sentence is void because the record does not recite that witnesses were examined in open court before sentence.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Orville L. Jones, for appellant.

Clarence A. Davis, Attorney General, and *George W. Ayres, contra.*

LETTON, J.

The petitioner brought habeas corpus proceedings to obtain his release from the penitentiary, where he was serving a life sentence under a warrant of commitment based on the following record: He alleges that the court failed to examine witnesses in open court to determine the degree of the murder, and because of such failure was without jurisdiction to pass sentence, and the sentence was null and void; and that he believes that, if the court had examined witnesses in open court, the court would have required a change of plea to "not guilty."

The record of the proceedings in the district court, so far as material, is as follows: "Now on this day comes the county attorney on behalf of the state of Nebraska, the said defendant, Floyd Fuller, being brought into court in the custody of the sheriff, was thereupon duly arraigned for plea; and the information herein read to him for plea thereto, says that he is guilty of the charge of murder in the second degree, which plea is accepted by the county attorney. Whereupon the said defendant was duly arraigned for sentence. And thereupon the said defendant was informed by the court of the nature of his said plea of guilty to the charge of murder in the second degree, of the consequences thereof, and of the

penalty attached by law thereto, and after being thus advised and instructed by the court, the said defendant still persists in his said plea of guilty and says that he desires to stand thereon. Whereupon the said defendant was inquired of if he had anything to say why the judgment and sentence of the court should not be pronounced against him, and showing no good and sufficient reason to the contrary." (Here follows a sentence of life imprisonment.)

It is contended that if the examination of witnesses to determine the degree of the crime, as provided by section 9130, Rev. St. 1913, is omitted, the court has no jurisdiction to pass sentence, and that habeas corpus will lie to discharge a prisoner confined under a void sentence.

The latter proposition may be admitted. The controlling question is: Is the sentence absolutely void, or is it merely erroneous and one which might have been set aside by proceedings in error.

The cases relied upon by the petitioner, upon examination, do not sustain his position. In *Michaelson v. Beemer*, 72 Neb. 761, the petitioner was convicted of a felony under a plea of not guilty upon a trial without a jury. On habeas corpus proceedings, it was held that the trial was a nullity because the only tribunal provided by the Constitution of the state to determine his guilt or innocence was a jury. He was held for trial before a jury in the proper county. In *Atwood v. Atwater*, 34 Neb. 402, another habeas corpus case, the record showed that the accused pleaded not guilty, and the court imposed a sentence without verdict and finding. The judgment was absolutely void for that reason.

In *In re Walsh*, 37 Neb. 454, the petitioner was convicted upon two counts, sentence on the second to follow at a date fixed after the expiration of the first. His first sentence had expired by good time, and the time fixed for the second sentence had not arrived, when he began proceedings. He was therefore held entitled to discharge, the court incidentally holding that the second

sentence was unauthorized, since forging and uttering a check only constituted one crime, and a cumulative sentence could not be imposed.

In *In re Jones*, 35 Neb. 499, the petitioner had been convicted and sent to the industrial school as being under the age of 18 years. Without his knowledge or consent, the sentence was set aside and he was brought back and sentenced to the penitentiary. The court held that the first sentence was not void, but merely erroneous, that the second was void, and he would be returned to the industrial school but for the fact that his term had expired.

This examination shows that, instead of these cases supporting petitioner's contention, they tend to support the opposite view. A few careless expressions may be found in opinions in error cases, which, if considered apart from the facts, or the nature of the case, may be misleading. General language used in opinions should always be considered and interpreted according to the facts and the nature of the proceeding. *Hennig v. State*, 102 Neb. 271, and *Lee v. State*, 103 Neb. 87, cited by petitioner, are both proceedings in error. In the latter case the jury failed to find the value of the stolen property upon a conviction for larceny. It was held, following a long line of decisions, that, no value being found, the judgment was defective, and it was said: "The jury failed to find any value for the property taken; then it follows the trial court has no jurisdiction to pass sentence." This was not an uncommon, but not a strictly correct and technical, use of the word "jurisdiction." The court had jurisdiction, but it was erroneously exercised, and the cause was reversed.

It seems evident that it was the intention of the legislature to protect one charged with murder in the first degree from the possibility of being sentenced to death merely upon his confession of guilt. There are a number of crimes which by statute have several degrees of punishment, depending upon the existence or nonexistence

of certain facts; for example, grand larceny of goods and chattels is punishable with imprisonment of from one to seven years, while for the larceny of horses or cattle, or of a last will, ten years' imprisonment may be imposed, and so in burglary the punishment may vary according to the existence of certain elements of intent.

When the state accepted a plea of murder in the second degree, it amounted to a nolle, or withdrawal, of the charge of murder in the first degree. The petitioner therefore was not convicted of a capital offense, but one punishable with imprisonment only.

He was fully informed of the nature of his plea and its consequences, and of the penalty, and, after being so advised and instructed, he still persisted in his plea. It is a matter of judicial knowledge that the universal practice in the trial courts of this state for the last half century has been that, where such a plea is tendered, the court inquires of the accused and his counsel and of the prosecuting attorney as to all the facts and circumstances of the case, and pronounces such sentence as these seem to warrant.

In *In re Application of Cole,* 103 Neb. 802, 807, it was held that, in a charge of murder in the first degree, the accused may not himself determine the degree of the crime, and that the court should determine the degree from the evidence; but it is also held that habeas corpus proceedings are not for the correction of errors, and that, if prejudicial errors have occurred after the defendant's guilt has been determined, the judgment may be set aside in proper proceedings, and the cause remanded; that the remedy is by petition in error, and not by habeas corpus. This is the same question presented here, and is decisive.

The defendant was offered the opportunity to tell the court any mitigating circumstances, and no doubt, if requested by him, the court would have heard witnesses. The mere fact that he failed to avail himself of the privilege is not one which he can take advantage of by habeas

corpus proceedings. The district court properly refused the writ, and its judgment is

AFFIRMED.

DAY, J., not sitting.

PRAIRIE LIFE INSURANCE COMPANY, APPELLANT, V. ALBERT T. SCHUMANN ET AL., APPELLEES.

FILED MARCH 27, 1920. No. 20830.

Appeal: FINDINGS: BILL OF EXCEPTIONS. In the absence of a bill of exceptions, the findings of fact made by the trial court will be presumed to be sustained by the evidence.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

T. W. Blackburn, for appellant.

Arthur C. Mayer, contra.

CORNISH, J.

As shown by the record, but not as indicated in appellant's brief, this is an appeal from the trial court's judgment sustaining defendant Schumann's special appearance and dismissing plaintiff's cause of action. There is no bill of exceptions in the record. In the absence of evidence, we must presume that the trial court's findings of fact, sustaining the special appearance, were true. The special appearance itself being ample, if true, to show that the court did not obtain jurisdiction of the person and subject-matter of the action, it follows that the judgment of the trial court must be affirmed. *Cady Lumber Co. v. Reed*, 90 Neb. 293.

AFFIRMED.

LETTON and DAY, JJ., not sitting.

DANIEL W. DONOVAN, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED MARCH 27, 1920. No. 20959.

1. **Highways: DEDICATION.** Evidence examined, and *held* to show that the highway in controversy was acquired by the public by both prescription and dedication.
2. ———: ———: **WIDTH.** The width of a public highway, acquired by adverse user or dedication, is to be determined as a question of fact by the character and extent of the user, or the amount actually dedicated to public use. It need not be 66 feet in width, as prescribed by statute.
3. **Adverse Possession: NUISANCE IN HIGHWAY.** The ten-year statute of limitations does not run in favor of one maintaining an obstruction in the public highway constituting a nuisance, as against either the public or an elector living within five miles of the highway who is peculiarly damaged thereby.

Opinion on motion for rehearing of case reported in 103 Neb. 663. *Former judgment of affirmance vacated, and judgment of district court reversed.*

CORNISH, J.

On motion for rehearing of *Donovan v. Union P. R. Co.*, 103 Neb. 663.

In 1874 the county officials of Merrick county, by proceedings more or less irregular, attempted to lay out and establish a road along the south side of and in defendant railroad company's right of way, running from Chapman to the Hall county line. From that time until about 1899, except as occasional obstructions in the road would prevent it, the road (with one detour of about a mile long, occasioned by trees, at a point known as the Strotman place) was traveled by the public as its highway, and became a highway by prescription. In 1895, in a suit brought by Clark and others, receivers, for the Union Pacific Railway Company against the county of Merrick, to enjoin the opening up of the road, a stipula-

tion was entered into, which recites as follows: "That the public highway of the county of Merrick, Nebraska, heretofore used and occupied by it parallel to the track of the Union Pacific Railway upon the right of way granted by acts of congress to the Union Pacific Railway Company is and shall be located and established so that the north line of the said highway is and shall be sixty-three feet south from and parallel to the center line of the main track of said railroad," etc. Then follows a further description of the road, so that it would not interfere with the depot grounds and stock-yards in towns.

We are of opinion that this stipulation, agreed to by the county board, and upon which the decree of the court was based, constituted a dedication to the public, for highway purposes, of the land therein described, binding upon the company and its lessees; that the land described, so far as it pertains to the defendant Union Pacific Railroad Company, is the same as that constituting the road in controversy, and substantially the same as that acquired by adverse user; and that the judgment of the trial court must be reversed. *Burk v. Diers,* 102 Neb. 721; *Lydick v. State,* 61 Neb. 309; *Lyons v. Mullen,* 78 Neb. 151; *Perry v. Staple,* 77 Neb. 656; *Kendall-Smith Co. v. Lancaster County,* 84 Neb. 654.

We will now consider certain reasons, given in the briefs, why it is thought this conclusion should not be reached.

Is the plaintiff empowered to bring this action? He is an elector, residing within five miles of the road, and would appear to be peculiarly damaged by its abandonment, in that the distance which he must travel going to town is thereby lengthened three miles. This objection is met by our decision in *Letherman v. Hauser,* 77 Neb. 731.

It appears that 14 years had elapsed at the time of bringing this action since the road had been used for highway purposes and it is urged that this operated as

a statute of limitations against both the public and the plaintiff. We are of opinion that the evidence does not show that the public ever voluntarily abandoned the road as a public highway. The evidence indicates that at one time the public authorities constructed culverts in the highway. Following the stipulation above referred to, the county undertook to lay out the highway, and ordered its overseers to clear obstructions from the road. The statute provides a way in which a public highway, needless or expensive, may be vacated. Rev. St. 1913, secs. 2856, 2857. This statute was not followed. A highway, once established, becomes the property of the public. The county acts as the agent of the public, and is not a necessary party to the action. The statute of limitations does not run against the public. A highway obtained by prescription or dedication does not need to be 66 feet wide, the width prescribed by the statute for laying out a highway.

Plaintiff, in bringing this action, acts in the name of the public and in its behalf. While it is true that, to maintain the action, he must show an interest different from the public generally, when he does show such interest he is clothed with all the powers and can assert the same rights as the public could, if it were bringing the action. It is not as if he were seeking to enforce a strictly private right. When this case was before us on demurrer to plaintiff's petition, we so held.

Section 7564, Rev. St. 1913, limiting the time for commencing actions for recovery of title or possession of lands, and excepting counties, cities, towns and villages from its provisions, is not applicable. The easement which the public acquires in land used as a highway has never been subject to loss by adverse possession before the amendment to this section. Lapse of time cannot establish a right to maintain a public nuisance. *Krueger v. Jenkins*, 59 Neb. 641; 29 R. C. L. 498, sec. 114; *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834.

Whatever conditions were in the stipulation between the defendant railroad company and the county shown in the petition were conditions subsequent, and not such as would work a forfeiture of the land dedicated for a public highway.

We are of opinion that, under the Norris act (37 U. S. St. at Large, ch. 181, p. 138), validating the conveyances and agreements of the railroad company concerning land, all question of the right of the railroad company to enter into the stipulation is removed.

We are of opinion that the road acquired by the public by user and dedication is in accordance with the one stipulated for in the suit of Clark v. County of Merrick. Through the government sections, where the Union Pacific Railroad Company's right of way is 400 feet in width, the highway acquired by user and dedication is 66 feet in width, the north line being 63 feet south of the center line of the main track. In sections where the width of the right of way is 200 feet, the highway is 37 feet in width.

The former opinion is set aside, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

DAY, J., not sitting.

CALVIN A. POTTER, APPELLEE, V. FRANK W. HOWSER, APPELLANT.

FILED MARCH 27, 1920. No. 20605.

Husband and Wife: ALIENATION: PROOF. To maintain an action for alienation of a wife's affections, the proof must show that defendant's acts and conduct were not only intended to effect an alienation, but that alienation was thereby actually accomplished.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Reversed.*

C. M. Skiles, for appellant.

Hastings & Coufal, A. V. Thomas and *Matt Miller, contra.*

DEAN, J.

Plaintiff recovered a judgment for $8,000 for alienation of his wife's affections, and defendant appeals.

The parties were married in 1900. Plaintiff was then about 28 and his wife about 18. They have six children, and in 17 years the family home has been in 10 or 12 places in three different states. In 1915 they moved to David City and lived as tenants at different times in two houses owned by defendant. This suit was begun in April, 1917.

It is charged that defendant, as a part of his plan to obtain the affections of Mrs. Potter, engaged her in telephone conversations in her husband's absence. Some testimony has been introduced on this point that in view of our conclusion we do not find it necessary to discuss.

Defendant denied that the telephone talks were on any subject other than respecting needed repairs about the house. He testified that his visits to the Potter home were necessary for the purpose of making repairs that were on one or more occasions made at plaintiff's request. The repairs he detailed at some length.

On the part of plaintiff there was testimony tending to prove that defendant was at one time seen riding in a buggy in the daytime with a lady whom the witnesses said they believed to be plaintiff's wife. There was also testimony to the effect that defendant's horse and buggy were frequently seen standing in front of plaintiff's house in the daytime. There is no testimony that defendant was ever at the Potter home except in the daytime, and there is no allegation of criminal conversation nor of an adulterous relation.

Defendant made a showing for a change of venue, and complained that there was local prejudice against him that prevented him from having a fair trial. While there

may have been some foundation for his complaint at the time of the trial, we are not prepared to say that the court erred in denying the application.

To maintain an action for alienation of a wife's affections, the proof must show that defendant's acts and conduct were not only intended to effect an alienation, but that alienation was thereby actually accomplished. *Bruce v. Galvin*, 183 Ia. 145; *Cash v. Childers*, 176 Ky. 448. It appears that while the present case was being tried Potter was living at his home with his family in a house owned by the defendant at David City.

Upon an examination of the entire record, we are satisfied that the competent evidence does not support the verdict. We believe that justice will be better served by a new trial.

REVERSED AND REMANDED.

ROSE, ALDRICH and DAY, JJ., not sitting.

ROBINSON CADILLAC MOTOR CAR COMPANY, APPELLANT, V. DAN B. RATEKIN ET AL., APPELLEES.

FILED MARCH 27, 1920. No. 21155.

1. **Intoxicating Liquors:** UNLAWFUL TRANSPORTATION: FORFEITURES. Section 2, ch. 109, Laws 1919, construed, and *held*, that the act contemplates the forfeiture of the vehicle of owners and lienors, who have voluntarily parted with possession, that are used in the unlawful transportation of intoxicating liquors.

2. ———: ———: ———. An automobile that is used for the unlawful transportation of intoxicating liquors, after section 2, ch. 109, Laws 1919, became operative, is subject to be forfeited and sold under the penalties therein provided, even though the buyer gave to a seller a valid mortgage lien on such car before the act became operative.

3. **Constitutional Law:** PROHIBITORY ACT: FORFEITURES. A mortgagee of an automobile that is seized and sold under section 2, ch. 109, Laws 1919, on the ground that it was used for the unlawful transportation of intoxicating liquors, cannot complain that he has been deprived of property without due process of law.

4. **Intoxicating Liquors: FORFEITURES: IMPUTATION OF GUILT.** When, under section 2, ch. 109, Laws 1919, a complaint has been filed against an owner of an automobile and his vehicle for unlawfully transporting intoxicating liquor, and both the person and the vehicle so charged are held for trial, the conviction of the owner imputes guilt to the vehicle and subjects it to forfeiture and sale.

5. ———: ———: **INCIDENT TO CONVICTION.** The forfeiture of an automobile under section 2, ch. 109, Laws 1919, is no part of the sentence imposed by the justice of the peace, but is an incident to the conviction of the owner or person in charge of the car.

6. ———: ———: **POLICE POWER.** The forfeiture and sale of an automobile under section 2, ch. 109, Laws 1919, when used for the unlawful transportation of intoxicating liquors, is a valid exercise of the police power.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Dort & Cain and *Graham & Silverman,* for appellant.

R. C. James, contra.

DEAN, J.

The Robinson Cadillac Motor Car Company, hereinafter called plaintiff, began this action in equity to recover an automobile that was seized on April 28, 1919, by the sheriff of Richardson county, on the ground that it was being unlawfully used by F. L. Wilson, its owner, for the unlawful transportation of intoxicating liquors. Wilson was arrested on the same day, and, being convicted on April 30, 1919, the sheriff was about to sell the car under section 42 of the prohibitory act, namely, chapter 187, Laws 1917, as amended, section 2, ch. 109, Laws 1919, when this action was begun. The amendment became operative nine days before the seizure, namely, on April 19, 1919. To prevent the sale plaintiff obtained a temporary injunction in the county court. Upon final hearing in the district court under an agreed statement of facts, the injunction was "dissolved and held for naught and fully discharged," and the sale of the automobile, so unlawfully used, was ordered. Plaintiff appealed.

These facts are agreed upon: When the car was seized plaintiff was the owner of a valid and subsisting first mortgage lien thereon that was executed by Wilson December 12, 1918, to secure payment of an unpaid portion of the purchase price approximating $1,100; that the mortgage was recorded in Buchanan county, Missouri, April 25, 1919; that until this action was begun plaintiff neither had nor was it chargeable with knowledge or notice of any of the illegal acts charged against Wilson, nor that the subsequent unlawful use of the car was contemplated by Wilson; that the car was removed from Missouri into Nebraska without plaintiff's knowledge or consent, and was about to be sold under the seizure, pursuant to the judgment of a justice of the peace, in disregard of plaintiff's mortgage; that Wilson was insolvent, and plaintiff was without actual notice of the proceeding and had no opportunity to assert any rights in the premises.

Section 2 of the act (Laws 1919, ch. 109) provides: "Any car, automobile, airplane, vehicle or means of transportation which shall be engaged in, or used for, the unlawful transportation of intoxicating liquors is hereby declared a common nuisance, and there shall be no property rights of any kind whatsoever in any car, automobile, airplane, vehicle or other means of transportation which shall be engaged in, or used for, the unlawful transportation of intoxicating liquors. Any peace officer having probable cause to believe that such vehicle is being used for the unlawful transportation of intoxicating liquors, shall make search thereof with or without a warrant and in every case where a search is made without a warrant the officer shall take the vehicle and the person in charge thereof into custody and a complaint shall forthwith be filed against said party and vehicle and a warrant shall issue and said party and vehicle shall be held for trial as in a criminal action. The vehicle and the liquor so seized shall not be taken from the posses-

sion of any officer seizing and holding the same by writ of replevin or other proceedings. Final judgment of conviction in such criminal action shall be in all cases a bar to any suits for the recovery of any vehicle so taken or the liquor transported thereby, or other personal property actually and directly used in connection therewith, or the value of the same, or for damages alleged to arise by reason of the seizing of such vehicle and the liquor contained therein, and on conviction, judgment shall be entered directing that the vehicle hereinbefore mentioned and enumerated, and other personal property actually and directly used in connection with said violation, shall be ordered sold by the court at public sale on ten days' notice and proceeds paid into the school fund as in case of fines and forfeitures, and the purchaser of such vehicle shall take title thereto free and clear of all rights, title and interest of all persons whosoever including all rights, title and interest of all persons claiming to be owners thereof and all persons claiming to have liens thereon."

Plaintiff argues that the act is unconstitutional in that "appellant's property is taken without compensation and without due process of law," and in that "the law is retroactive as to appellant." It is also contended generally that "there is no necessity for the exercise of the police power, and the regulations prescribed are unreasonable," and that the legislature "did not intend to forfeit rights of innocent mortgagees."

The 1917 prohibitory act was construed in *State v. Jones-Hansen Cadillac Co.*, 103 Neb. 353. The decision was rendered and the opinion adopted March 27, 1919, while the 1919 legislature was in regular session. We there held that the 1917 act "must not be construed to forfeit the property of innocent citizens, unless, from the statute in the light of its object and existing conditions, it is manifest that the legislature considered such forfeiture necessary for the 'preservation of the public peace, health and safety.'" In that case it was pointed

out that the 1917 act did not provide for the forfeiture of the property of innocent citizens. Subsequently, the 1919 legislature, as herein noted, being then in regular session, amended section 42, ch. 187, Laws 1917, so that so far as relevant here respecting the sale of a vehicle, so used unlawfully, the act expressly provides: "The purchaser of such vehicle shall take title thereto free and clear of all rights, title and interest of all persons whosoever, including all rights, title and interest of all persons claiming to be owners thereof and all persons claiming to have liens thereon." The act is severely plain. It is without limitation or exception. There is no room for construction. Once the owner of the conveyance, or person in charge, is convicted, the conveyance so unlawfully used by him shall be forfeited and ordered sold.

Plaintiff argues that, the car having been sold and the mortgage obtained from the purchaser before the amendment was adopted, "the law is retroactive as to appellant." It may be noted, however, that the deferred payments on the mortgaged car in the present case were long delinquent when the car was seized. *Mugler v. Kansas,* 123 U. S. 623, is a case having to do with the forfeiture of property used for the illegal storing of intoxicating liquors. At page 672 it is said: "The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community." So in the present case. The car was used after the passage of the act for a purpose declared by the act to be unlawful. We hold that, upon seizure of the car and conviction of the owner, the car, in the language of the act, became "a common nuisance" in which there was "no property rights of any kind whatsoever."

Plaintiff cannot be said to have been deprived of his property without due process of law, even though it was

taken without actual notice as to him and without compensation. Section 42, as amended, provides that a complaint shall be filed against the person in charge of the vehicle and also against the vehicle, and that "said party and vehicle shall be held for trial as in a criminal action." Upon conviction of the owner or person in charge of the car his guilt is imputed to the vehicle, and under the act it is forfeited and ordered sold by the court.. It was held, in a similar case that was brought under a like statute, that the seller could not recover an automobile that was forfeited, even though he understood it was to be used for an innocent purpose. *White Auto Co. v. Collins*, 136 Ark. 81. The present case is clearly distinguishable from *McConnell v. McKillip*, 71 Neb. 712, 719. The procedure for condemnation and forfeiture pointed out in the concluding portion of the opinion in that case is substantially the procedure provided by the statute under consideration.

In *United States v. One Saxon Automobile*, 257 Fed. 251, the principle involved is the same as here. In that case a seller took notes from the buyer for the unpaid part of the purchase price of an automobile "secured by a deed of trust covering the property." The buyer loaned the machine to another who was subsequently convicted of using it to transport spirituous liquors unlawfully with intent to defraud the United States of unpaid taxes on the liquor. The buyer was an innocent owner and the seller an innocent lienor, but the car was confiscated and ordered sold, and the rights of both owner and lienor were forfeited; the court holding that congress has power to impose the penalty of forfeiture on property used to defeat the revenue laws, even though the owner was innocent and had no knowledge of the unlawful use. It is, however, there pointed out that if the car is stolen or taken by a trespasser, or if the owner loses possession by forces of nature beyond his control, the innocent owner is protected, because, unlike the owner who voluntarily gives possession to another, he did

not in a legal sense part with his right of possession. We hold to the interpretation of the rule in the *Saxon* car case, as herein stated, as being a reasonable interpretation of the act in question and applicable to the facts before us. In that case the court used this language, which is peculiarly applicable here: "If one thus engaged in illicit transportation could protect his automobile from forfeiture on proof that the legal title was in some one else, or that some one else had a mortgage on it, the difficulty of enforcing the law would be greatly increased, and the penalty of forfeiture almost always evaded."

In *Smith v. State of Maryland*, 18 How. (U. S.) 71, 75, the supreme court construed a Maryland statute which made it unlawful to take oysters in any of the waters of the state with a scoop or drag, or any other instrument than tongs or rakes. The act provided, generally, that the boat or vessel employed for such unlawful purposes, together with her papers, furniture, tackle, and apparel, and all things on board the vessel, should be forfeited to the state. That case involved the seizure, under the act in question, of a sloop called the Volant, while dredging for oysters. The vessel was condemned to be forfeited to the state by a justice of the peace of Maryland, before whom the proceeding was had. On appeal to the state courts, the decree of the forfeiture was affirmed. When it came to the United States supreme court, it was said: "It is the judgment of the court that it is within the legislative power of the state to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments." *United States v. Brig*

Malek Adhal, 2 How. (U. S.) *210, *233, and cases cited. In the *Malek Adhal* case, it is said: "The next question is whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress. Here, again, it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of congress) from which such piratical aggression, etc., shall have been first attempted or made shall be condemned." Substantially to the same effect is the holding in *United States v. Two Bay Mules,* 36 Fed. 84.

Plaintiff says: "Section 29 of the Nebraska act (being chapter 187, Laws 1917) provides for the abatement of nuisances defined in the act by a proceeding in equity," and argues that the justice court is without jurisdiction. We think the argument is not sound. There are other sections of the act that must also be considered. Section 28 provides that "buildings, tenements, or places where intoxicating liquors are manufactured, sold, * * * or given away in violation of law," and the "fixtures and other property used in maintaining such place, * * * are hereby declared to be common nuisances." Section 29 provides that "the building or ground upon which said nuisance exists" may be perpetually enjoined. Section 30 provides: "Evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance." Section 31 provides the penalty for the violation of sections 28, 29, and 30. Section 32 provides for the "effectual closing of the building" for "a period of one year unless sooner released." It is evident that the offense complained of here could not be maintained under the sections of the act to which reference is had.

Section 42 under which the complaint was filed seems to cover the entire subject so far as it relates to automobiles and other conveyances unlawfully used to transport spirituous liquors.

It has been suggested that a justice of the peace is without jurisdiction of the subject-matter because the Constitution limits his jurisdiction in a criminal case to imprisonment not exceeding three months or a fine not exceeding $100. In Minnesota a justice of the peace in a criminal case is empowered by the Constitution to impose a fine not exceeding $100. In *State v. Hanson,* 114 Minn. 136, it is said: "The fact that the statute (section 1554) provides for the destruction of the liquors and the sale of other property used in the business of keeping an unlicensed drinking place, which in this case were of the value of $600, does not affect the jurisdiction of the justice to hear and determine the complaint for a violation of the statute, for the reason that the forfeiture and disposition of such property follows, as an incident to the conviction, as a proper exercise of the police power of the state."

It is pointed out in *State v. Pope,* 79 S. Car. 87, that forfeiture is no part of the sentence imposed by the magistrate on one convicted of unlawful selling of liquor, but is by operation of law.

The right of the legislature to enact the law in question is derived from that undefinable branch of government known as the police power, which by some writers is said to bear the same relation to the state that the principle of self-defense bears to the individual. *Barrett v. Rickard,* 85 Neb. 769. Whether the necessity exists for such an exercise of the police power as the act provides is a legislative question. The amendment under consideration was enacted for the express purpose of meeting a situation that to the lawmaker appeared to have become intolerable. The facility with which automobiles and other high-power means of locomotion, under the control of a single person, untram-

meled as to selection of time or route, could be used to transport spirituous liquors unlawfully, made the prohibitory act practically impossible of enforcement. Hence the act in question. We conclude that the act provides a valid exercise of the police power, and that it does not contravene the provisions of the fundamental law.

The judgment of the district court is

AFFIRMED.

CORNISH, J., dissenting.

DAY, J., not sitting.

SOPHIA TORSKE, APPELLEE, V. EDWARD JOHANSEN, APPELLANT.

FILED MARCH 27, 1920. No. 20950.

Bastardy: EVIDENCE. "In a bastardy proceeding, only a preponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong." *Parrish v. Hodges*, 98 Neb. 403.

APPEAL from the district court for Kearney county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

J. L. McPheely and *Charles A. Chappell,* for appellant.

Lewis C. Paulson, contra.

ALDRICH, J.

Plaintiff filed complaint in the county court of Kearney county under sections 357-364, Rev. St. 1913, charging defendant with being the father of her child. Defendant pleaded not guilty. A preliminary examination was had, defendant held to appear in the district court to answer the charge of bastardy. Trial was had to a jury, defendant found guilty. The defendant's principal

defense is that the evidence was insufficient. We have laid down rules governing the sufficiency of evidence in this class of cases, and we will be guided by these rules as they are the law of the state. "In a bastardy proceeding, only a preponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence, will be sustained unless it is clearly wrong." *Parrish v. Hodges,* 98 Neb. 403. "A verdict of guilty, in a prosecution on a charge of bastardy, where the evidence is conflicting, will not be set aside unless it clearly appears to be wrong." *Cowan v. Ertel,* 95 Neb. 380. Following the same idea, we have again said in *Hutchinson v. State,* 19 Neb. 262: "A judgment will not be reversed upon the ground that the verdict is against the weight of evidence where the testimony is conflicting, if there is sufficient testimony to sustain the verdict." These are well-recognized rules of this court in bastardy proceedings. An examination of the record discloses that the evidence is in conflict, but the naturalness of plaintiff's evidence persuaded the jury to believe her testimony, and we will not disturb it unless it appears materially or clearly false.

We have carefully analyzed the instructions given by the court. They are correct, and responsive to the issues presented to the jury, and accurate in the application of the law to the facts.

The evidence shows that the child was born within the period of gestation, and that the defendant was the only man with whom she had sexual intercourse during this period.

The verdict is right, and is

AFFIRMED.

STATE OF NEBRASKA, V. HUGH M. BUTCHER.

FILED MARCH 27, 1920. No. 21253.

1. **Chattel Mortgages:** SALE OF PROPERTY: PENALTY. Section 534, Rev. St. 1913, subjects each and every person who violates the provisions thereof, and thereby depriving the mortgagee of his mortgage security to his injury, to the punishment therein provided.

2. ———: ———: PROSECUTION: DEFENSE. In a prosecution under said section, the accused may show as a defense that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, or that the mortgage debt has been paid.

3. ———: ———. The foregoing statute makes the inhibited act constitute the crime.

4. **Information:** SALE OF MORTGAGED CHATTELS. An indictment in the language of the statute is sufficient. The law was enacted to prevent the fraudulent transfer of mortgaged chattel property.

ERROR to the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Exceptions sustained.*

Walter R. Raecke and *John C. Martin,* for plaintiff in error.

Elmer E. Ross, contra.

ALDRICH, J.

The defendant was charged with violation of section 534, Rev. St. 1913, which section reads as follows: "Any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the debt secured by said mortgage, to any such sale, transfer, or disposal, shall be deemed guilty of a felony,

and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars, or imprisoned in the penitentiary for a term not less than one year nor more than ten years, or both."

Defendant pleaded not guilty, and at the close of the evidence on behalf of the state, upon motion of counsel for defendant, the trial court instructed the jury to render a verdict finding defendant not guilty. The state brings this petition in error to have decided the question of law involved in the trial court's ruling.

It appears that defendant gave a mortgage to the Central City National Bank on a certain manure spreader, and that defendant sold the spreader at a public sale. The clerk of the sale was president of the mortgagee bank, and as clerk received the proceeds of the sale of the spreader. The record is not clear on whether the clerk gave express oral consent to this sale, but there was either oral consent in so many words or acquiescence by remaining silent. Defendant bought a team of horses at the sale, and the clerk turned the proceeds of the spreader over to the party selling the horses, knowing at the time that the mortgaged spreader had been sold. The bank has since been unable to collect the full amount of the mortgage debt, and defendant has boasted that he "got the tin."

The doing of the inhibited act constitutes the crime. The statute was enacted to prevent the fraudulent transfer of mortgaged chattel property.

An examination of the history of this statute to its present form clearly indicates the purpose of the legislature to be the protection of the mortgagee in his security, and to permit him to have the full value of the chattel property applied to the mortgage debt. Prior to the present enactment the offense consisted in the selling of the mortgaged property without the consent of the mortgagee; the present statute being that the consent to the sale by the mortgagee must be in writing. It is clearly within the province of the legislature

to enact the law in its present form, and this act has been held to be constitutional in *State v. Heldenbrand*, 62 Neb. 136. Instances can well be perceived in which a mortgagor, acting in good faith and selling the mortgaged property without written consent, might find himself within the inhibited letter of the law, and yet his act in disposing of the property may not have resulted in any injury or damage to the mortgagee. Thus, if on oral consent the mortgagor sold the property at its fair value and immediately turned the proceeds of the sale to the mortgagee, it would seem that the mortgagee was not deprived of any right, the purpose of the mortgage being to secure the mortgage debt to the extent of the value of the property, and the law, so far as its purpose was concerned, would be completely vindicated. The state would have no purpose in a prosecution to sustain a mere technical violation of the law, the result of which has harmed no one in his property, or the good morals of the citizens of the state. Under this statute the state makes out a *prima facie* case when it has established beyond a reasonable doubt the execution and delivery of a valid chattel mortgage, and the sale of the chattel mortgaged property during its life without the written consent of the mortgagee. But, if it be shown by the mortgagor that the full value of the mortgaged chattel has been turned over to the mortgagee in payment in whole or in part of the mortgage debt, the defense thus established would be complete. It is not the policy of the law that the state should be put to the expense of a prosecution or become a means of enabling a mortgagee, who might be actuated by some revengeful motive, to prosecute a case under this statute where a technical violation only has been established, and where the mortgagee has not been wronged or injured in his mortgage security. In the instant case, the proof fails to disclose that the defendant turned over the proceeds of the sale. In fact, the testimony shows that the mortgagor received the money and thereafter boasted that "he got

the tin." Under the interpretation which we have given to this statute, and the facts developed upon the trial, we think the court erred in directing the jury to return a verdict of not guilty.

Under section 534, Rev. St. 1913, an indictment in the words of the statute is sufficient. The statute in question contains all the elements of the crime for which it is sought to provide punishment. The offense is purely statutory. The criminal act charged is made to consist in doing the things which the statute inhibits and makes their commission a crime. Hence, the law does not provide for criminal intent as being an essentially concomitant ingredient of the crime.

We recognize the necessity of enforcing the property rights of a mortgagee. He should receive ample protection against fraud, annoyance and unnecessary expense. The question of guilt should turn upon whether or not the mortgagee has in fact been injured by the mortgagor.

Exceptions to ruling on motion are

SUSTAINED.

LETTON, J., not sitting.

ARCHER M. BUNTING, APPELLEE, V. LEWIS HROMAS ET AL., APPELLANTS.

FILED MARCH 27, 1920. No. 21346.

1. **Wills: DEVISE: PERPETUITIES.** An executory devise of a life estate in land to E. A. B. living at time of testator's death, a determinable estate over to A. not living at time of testator's death conditioned that if A. dies without issue the reversion to go to the legal heirs of the testator, is within the rule against perpetuities, namely, the longest possible period for vesting of an executory estate is the life or lives in being and 21 years thereafter, to which may be added the ordinary period of gestation for the case of posthumous children. In such case, A. takes the entire estate free from the burden of the reversion.

2. ———: CONSTRUCTION: PERPETUITIES. In determining whether a given case is within or without the rule against perpetuities, the court is guided by what is possible to occur under the will, rather than what did occur.

3. ———: ———: ———. Where a will contains provisions which violate the rule against perpetuities, it will not be set aside *in toto*, but will be carried out in so far as it is legal to do so. The rule against perpetuities only cuts off the estates which are to take effect beyond the period limited by the rule. In such case, the last taker within the rule would take the entire estate.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Hastings & Coufal, for appellants.

Archer M. Bunting, contra.

DAY, J.

This is an appeal by the defendants from a decree of the district court for Butler county compelling specific performance of a land contract.

By appropriate pleading the plaintiff alleged his seisin in fee of the S. W. ¼ of section 20, township 13, range 3 east, in Butler county, Nebraska; the execution of the contract; the full performance of its terms on his part; and the refusal of the defendants to perform.

The answer is so framed as to raise solely the merchantability of the plaintiff's title in so far as it rested in the provisions of the will of one Alonzo Barnes and subsequent conveyances thereunder; the contention being that there was outstanding contingent remainders in the heirs at law of Alonzo Barnes created by the provisions of the will which have not been legally barred, released or surrendered to the plaintiff.

The facts are stipulated, and such as are necessary to understand our conclusions will appear throughout the opinion.

On October 3, 1897, Alonzo Barnes, a resident of Lancaster county, Nebraska, died testate, seised in fee of several tracts of land and city lots, among which were

the premises above described and the subject of this controversy. On January 8, 1898, the will of the testator was duly and regularly admitted to probate, and a decree entered establishing as heirs at law the following named children of the testator, with their respective ages, as follows: Harriet M. Cooper, age 35; Julia Pfanstiehl, age 33; Emma M. Sheffield, age 31; Edwin Alonzo Barnes, age 29; and Ora L. Barnes, age 23. By separate clauses of his will the testator devised to each of his children above named specifically described real estate. To the daughter Ora was devised city lots, to each of the other children farm property. The devising clauses of the will to his four children, Harriet, Julia, Emma, and Edwin Alonzo, were couched in identical language, except as to name and description of the property, and the use of the pronoun. In the devise to Ora, the words "and to her children," which followed the name of the devisee in each of the other cases, were omitted. The devise to the testator's son was as follows: "I also give and bequeath to my beloved and only son, Edwin Alonzo Barnes, and to his children, all of the S. W. ¼ of section 20, in township 13, range 3 east, Butler county, Nebraska." A later clause in the will provides: "It is also my will in case either of my children hereinbefore mentioned by name, shall die before their companion (husband or wife), and their children also die without issue, that the real estate herein willed to said child of mine, shall, at the decease or remarriage of the said companion (husband or wife), revert back to my own legal heirs, instead of to the heirs of my son-in-law or daughter-in-law." At the time of the probate of the will the testator's son and his daughter Ora were unmarried. Subsequent to the probate of the will, and during August and September, 1904, the four daughters of the testator, with their respective husbands (the daughter Ora, since the probate of the will, having married one Tuttle), joined in the execution and delivery of a quitclaim deed purporting to convey the premises in

controversy to Edwin Alonzo Barnes, the said conveyance containing the recital that the grantors in said deed were the heirs at law of Alonzo Barnes, the consideration of the conveyance being the reciprocal conveyance by each of the five heirs at law of Alonzo Barnes, releasing any interest that they might have in the premises that were previously devised by the will of Alonzo Barnes to each of his said children. Subsequent to the probate of the will, Edwin Alonzo Barnes married, and on August 25, 1898, he and his wife, Lulu M. Barnes, executed and delivered a quitclaim deed to the premises now in controversy to Alonzo D. Wilkinson, and on the following day the said Alonzo D. Wilkinson made, executed and delivered a quitclaim deed to the same premises to Lulu M. Barnes. On September 19, 1904, Lulu M. Barnes and her husband, Edwin Alonzo Barnes, executed and delivered a warranty deed to the said premises to C. H. Eubank, and on October 7, 1904, the said Eubank and his wife executed and delivered a warranty deed to the premises in controversy to Anna M. Bunting, and on February 4, 1910, the said Anna M. Bunting and her husband executed and delivered a warranty deed to said premises to the plaintiff. Edwin Alonzo Barnes died October, 1908, leaving surviving him his widow, Lulu M. Barnes, and a minor son, Alonzo Barnes; this son has reached his majority, and on August 4, 1919, executed and delivered to the plaintiff a quitclaim deed to the said premises. Each of the above mentioned conveyances, as well as the probate proceedings, are reflected in the abstract submitted by the plaintiff to the defendants before October 1, 1919, the date designated in the contract for closing the deal.

At the outset of the case, and as a basis for our determination of the question involved, it is necessary for us to construe this singularly phrased will. The decisions of the courts are numerous as to the legal and technical meaning of words usually employed in wills, and in some of the states some fine distinctions and re-

finements have been made. These decisions are of but little value in this state in the construction of wills, as we are now committed to the doctrine that the intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will. No particular words or conventional forms of expression are necessary to make a valid will. The court without much regard to canons of construction or technical language will place itself in the position of the testator, ascertain his will, and enforce it in all its parts, if it be lawful to do so. *Weller v. Noffsinger*, 57 Neb. 455; *Grant v. Hover*, 103 Neb. 730. Viewing this will in all its parts, it seems fairly certain that the underlying thought in the mind of the testator was a desire that his property should be kept in his own family, and that it should descend along the line of his own blood, and not otherwise. We think the clause of the will, "I give and bequeath to my beloved and only son Edwin Alonzo Barnes and to his children," when considered in connection with the later clauses, must be construed to give the testator's son a life estate only, and that the words "and to his children" must be considered as words of purchase; that it was the intention of the testator that, if children be born to the son Edwin Alonzo, they should take direct under the will, and not through their father Edwin Alonzo. Construing the will further, it would seem that the testator did not desire that the children of Edwin Alonzo should take the fee title except on condition of issue born to such children, and upon the failure of issue the fee should, in the language of the will, "revert back to my own legal heirs." Apply this construction of the will to the facts of the case before us, and this situation is presented: The son of the testator, Edwin Alonzo, living at the time of the testator's death, took a life estate in the premises. On the death of Edwin Alonzo, in October, 1908, his son Alonzo, not in being at the time of the testator's death, took a qualified estate in the premises. This qualified estate

became an absolute fee on the contingency of issue born to Alonzo, and in the event of the death of Alonzo the estate was to revert to the legal heirs of the testator. In this analysis we have not considered the interest of the widow of Edwin Alonzo, as it is not necessary in the view we have taken of the case. In any event, her rights would be terminated by her deed.

The question then arises: Does the will in whole or in part contravene any provisions of the established law? We think it does. In part at least it runs counter to the well-established doctrine of the common law preventing the creation of perpetuities by will. The common-law rule, which is a part of the law of this state, provides that the longest possible period for vesting an executory estate is the life or lives in being and 21 years thereafter, to which may be added the ordinary period of gestation. 2 Reeves, Real Property, secs. 956-973. In construing this rule, whether an executory devise falls within or without the operation of the law, it must be viewed in the light of what might possibly occur, rather than by what did occur, and its validity must be determined as of the time of the testator's death. 2 Reeves, Real Property, secs. 961, 962. There is some division of authority as to the effect of a failure of a gift because it violates the rule against perpetuities. We are inclined to adopt the view that the will of the testator is not to be set aside *in toto* because some of its provisions violate the rule against perpetuities, but is to be carried out as far as it is legal to do so, and that the rule against perpetuities only cuts off the estates which are to take effect after the prescribed period. In such case the last taker within the rule would take the entire estate, and those devises outside of the rule would be held to be void *ab initio*. See note under *Saxton v. Webber*, 20 L. R. A. 509 (83 Wis. 617). A simple illustration from the facts in the case and the possibilities thereunder is sufficient to establish that the contingent remaindermen fall

within the inhibition of the rule against perpetuities as hereinbefore announced. The first taker, Edwin Alonzo, died in 1908. His son, Alonzo, the second taker, has entered upon the enjoyment of his qualified estate. He might live for a period of 50 or 60 years in the enjoyment of this estate, and then die without issue, in which event the property under the will was to go to the testator's legal heirs. The contingent right of the remaindermen would thus be postponed to a period long beyond the life in being, Edwin Alonzo, and 21 years thereafter. In such case the rights of the remaindermen must be held to be void *ab initio,* and that the second taker under the will, Alonzo, took the entire estate. It would necessarily follow from what has been said that the deeds executed by Edwin Alonzo Barnes, and his wife, Lulu M. Barnes, and the subsequent deed from Alonzo Barnes to the plaintiff would vest a merchantable title in the plaintiff to the premises described, based upon the will of the testator, Alonzo Barnes. In addition to the deeds just above mentioned, the daughters, heirs at law of the testator, with their respective husbands, have also united in a deed which has ultimately merged in the plaintiff. It seems to us, from any view point that might be taken, the entire title passed under the will of the testator is merged in the plaintiff in this action.

The decree of the district court is right, and is

AFFIRMED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. J. F. ROESER ET AL., APPELLEES.

FILED APRIL 17, 1920. No. 20437.

Schools and School Districts: CONTRACTOR'S BOND: ESTOPPEL. The statute requires a bond given by a contractor upon the erection of a schoolhouse to be signed by two sureties. A bond was executed and approved signed by one surety only. Plaintiff furnished build-

ing material to the contractor, who failed to pay the bill. *Held*, in this action upon the bond, that the surety was entitled to rely upon the performance of the legal duty of the school board to see that a bond in accordance with the statute was executed before the contract was let, and that the bond being of a public nature and accessible in the hands of the school board to the inspection of interested parties, no estoppel arises on the part of the surety on the ground that, the materialman having furnished the goods relying upon the bond, the surety is estopped to question its validity.

Opinion on motion for rehearing of case reported in 103 Neb. 614. *Former judgment of reversal vacated, and judgment of district court affirmed.*

PER CURIAM.

On motion for rehearing. Former opinion reported in 103 Neb. 614. Action upon a bond given by a contractor who had engaged to build a schoolhouse. The terms and conditions of the bond were not in strict compliance with the statute, but it was held that the law entered into the contract, and that it was a statutory bond. Upon a motion for rehearing, argument was ordered upon the question whether a bond given under a statute which requires two sureties is valid when signed by one only. Upon this point it is said in the former opinion: "But when a surety signs a bond *that specifies upon its face* that only one surety will sign, the party who is recited in such bond as surety does by signing it 'waive the defect.'" Did the bond in question so specify? It recites: "That J. F. Roeser, of Exeter, Nebraska, hereinafter called the principal, and C. C. Wullbrandt, as *sureties*, are jointly and severally held," etc. In other parts we find recited, "That no liability shall attach to the *sureties* unless;" "Unless such obligee shall deliver such notice to the *sureties;*" "That in no event shall the *sureties* be liable for a greater sum," etc.

Considering the whole bond, we are now of the opinion that the inference drawn in the former opinion, that the bond "specified upon its face that only one surety will sign," is not warranted.

In *Beawfage's Case,* 5 Coke (Eng.) 99, under a statute which required more than one surety upon a bail bond, the sheriff took but one surety. He brought an action on the bond, the defense was that the bond was void because the statute required more than one surety. It was held that the surety clause was for the benefit of the sheriff who might at his own risk take but one surety, upon the principle "*quilibet potest renunciare,*" etc. This seems to be the leading case upon the question, and has been followed both in England and this country. *Peppin v. Cooper,* 2 B. & Ald. (Eng.) 431; *Shaw v. Tobias,* 3 N. Y. 188; *People v. Johr,* 22 Mich. 461. However, in *Cutler v. Roberts,* 7 Neb. 4, 13, it is said, speaking of a statutory bond which required two sureties: "The law in such a case enters into and forms a part of the contract, and a surety may insist as a defense, in an action on a bond signed by but one surety, that he is not liable thereon, the statute being notice to all parties concerned that two sureties were required, unless the surety waive the condition prescribed by the statute." *Fletcher v. Leight, Barrett & Co.,* 4 Bush (Ky.) 303, is to the same effect. A majority of the court believe we should adhere to the *Cutler* case for the following reasons: The surety who signed was under no duty to see that another surety signed the bond. He was entitled to rely upon the performance of the legal duty of the school board to see that a bond in accordance with the statute was executed before the contract was let. The bond is of a public nature and accessible in the hands of the school board to the inspection of any person interested in furnishing labor or material for the erection of the schoolhouse. The materialman was under no obligation to sell if the bond was not legally executed. He was presumed to know the law just as the surety was so presumed.

No waiver was alleged in the petition. It fails to show a proper execution of the bond as the law requires. The demurrer therefore was properly sustained. The cases

cited by the appellant relate to other than statutory bonds and are inapplicable. For these reasons, the judgment of this court is set aside and the judgment of the district court is

AFFIRMED.

JOHN MCLAUGHLIN V. STATE OF NEBRASKA.

FILED APRIL 17, 1920. No. 20920.

1. **Intoxicating Liquors:** UNLAWFUL TRANSPORTATION. To constitute an unlawful transportation of intoxicating liquors under chapter 187, Laws 1917, it is not necessary that the transportation be from a place outside the state to a place within the state. Any transportation of intoxicating liquors is unlawful unless brought within the exceptions of the statute.

2. ———: ———: COMPLAINT. A complaint charging the unlawful transportation of intoxicating liquors is not defective because it fails to specify the quantity of liquor transported.

3. ———: RIGHT TO KEEP. The right to keep a reasonable quantity of intoxicating liquors in one's private dwelling-house for personal use, provided for in section 11, ch. 187, Laws 1917, does not imply any lawful means for obtaining possession of liquor after such act went into effect.

ERROR to the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

S. P. Davidson, for plaintiff in error.

Clarence A. Davis, Attorney General, George W. Ayres, J. B. Barnes, F. A. Safranek and *Lewis C. Westwood, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a conviction had under chapter 187, Laws 1917, for transporting intoxicating liquors. The complaint charged that defendant "did bring and transport intoxicating liquors into the state of Nebraska and into Johnson county, city of Tecumseh

of said state of Nebraska, contrary to and in violation of the prohibitory law of the state of Nebraska, prohibiting the manufacture, keep, sale and transportation of liquor in the state of Nebraska." Defendant demurred to the complaint, alleging that it did not state facts sufficient to constitute a crime or to give the court jurisdiction. The demurrer was overruled.

A jury was waived, and trial proceeded on the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties hereto, and in open court, that on the 26th day of March, 1918, defendant was a *bona fide* resident of Johnson county, Nebraska, and had been such resident for more than twenty years last past; that on said day said defendant returned to said county, and to the city of Tecumseh therein, from St. Joseph, Missouri, and brought with him some intoxicating liquors, to wit, whisky, which he carried on his person, or in a hand bag or satchel in his hands; that said intoxicating liquors were seized by the complaining witness, with defendant's consent, and taken from defendant's hand, after he had arrived at the city of Tecumseh, aforesaid; but said liquor was so carried and brought by said defendant from St. Joseph, Missouri, to Tecumseh, Nebraska, for his own use, and for his medicinal use, and not to sell or give away or otherwise dispose of to any other person whatever. Said defendant had been accustomed for many years last past to use intoxicating liquors, as he claims, for the benefit of his health, and he brought the said liquor in controversy into said city of Tecumseh on his way to his home in said county, for that purpose and no other; said city of Tecumseh being on his way to his home."

Defendant was found guilty, and the court imposed the minimum fine of $100 and costs.

It is claimed that the demurrer ought to have been sustained because the complaint charged merely that defendant "did bring and transport intoxicating liquors

into the state of Nebraska and into Johnson county, city of Tecumseh of said state of Nebraska," without alleging that the liquors were brought or transported from any place outside of Nebraska, and without alleging the quantity of liquor transported, or that it was transported for an illegal purpose, and not for medicinal, mechanical, scientific, or sacramental purposes. In support of this contention, counsel for defendant cites sections 2 and 3 of the chapter under which the prosecution was brought. By section 2 the transportation of intoxicating liquors is expressly prohibited, and there is no requirement that the transportation of the inhibited article shall be from a place without the state to a place within the state. Giving the word "transport" its usual and ordinary meaning, as its place in the context seems to require, it means to carry or convey from one place or station to another, and in this respect the complaint is sufficiently definite.

The statute makes certain exceptions in the case of liquors used for medicinal, mechanical, scientific, and sacramental purposes; but it also provides that these exceptions are for the benefit only of "persons specially authorized in the manner and to the extent only as hereinafter provided." Certain definite and specific exceptions are provided, not only in section 2, but in other sections of the chapter, which, when complied with, suspend the operation of the prohibitions contained in section 2. It is true that the complaint does not negative these exceptions; but this court has already held that in prosecutions under this statute it is not necessary to do so—defendant must avail himself thereof as a matter of defense. *Fitch v. State*, 102 Neb. 361.

Nor is the complaint defective because of its failure to allege the quantity of liquor. Laws 1917, ch. 187, sec. 44. It follows that the demurrer was properly overruled.

It is argued that under section 11 of the act under consideration a person may lawfully keep liquors in his

private dwelling-house in such quantity as is reasonably sufficient for his personal use, and it is claimed that the right to keep such liquors necessarily implies some adequate method of obtaining them. This argument carried to its logical conclusion would destroy the whole purpose of the legislation. If, because the statute permits the possession of a reasonable quantity of intoxicants in the home, we must hold that this gives a right to convey liquors to the home, we might then be called upon to go a step farther and hold that the manufacture of intoxicating liquor was permissible, because without a supply there could be no transportation. This we cannot do.

The record is free from error, and the judgment is

AFFIRMED.

LETTON and DAY, JJ., not sitting.

OSCAR S. HERBERT, APPELLEE, V. AUGUST KATZBERG, APPELLANT.

FILED APRIL 17, 1920. No. 21031.

1. **Evidence** examined, and *held* to support the verdict.
2. **Trial**: QUOTIENT VERDICT. The mere fact that jurors upon retirement ascertained the amount to which each juror believed the plaintiff was entitled, and afterwards agreed upon the average of these amounts as the amount of recovery, does not avoid the verdict, where it also appears that there was no previous agreement that the sum thus arrived at should be controlling, and no juror was bound to accept this amount unless he believed it to be a just and fair estimate of the damages sustained.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed on condition.*

Walter M. Crow, for appellant.

James E. Addie, contra.

LETTON, J.

Plaintiff was bitten by a dog belonging to defendant. He charges that the dog was a vicious and dangerous animal; that it was permitted to run at large, although defendant well knew this fact and that he was in the habit of attacking human beings. The answer was a general denial.

We think the evidence sustains the verdict. The evidence shows that the plaintiff, who was a painter by trade, went to the defendant's house upon business. While approaching the house, three dogs ran out towards him, and he was bitten by a young shepherd dog belonging to defendant. Defendant's evidence tends to prove that the dog which inflicted the injuries belonged to one Abel, and was a brother to defendant's dog, but the evidence is sufficient to sustain the verdict of the jury as to the identity of the offending canine.

The doctor who attended plaintiff testified that there were four wounds made, the lower one much the deepest, being about a half to three-quarters of an inch in depth; another was very small and not so deep. There was also a wound that appeared as though something had penetrated the skin and torn its way out and left a ragged edge, and just above that there was a small wound just penetrating the skin. He opened the punctured one, cauterized all the wounds, packed the lower one with gauze and treated it with an antiseptic ointment. He also testified that there was danger of hydrophobia for two years from the time that a person is bitten by a dog which may be affected by rabies, and that plaintiff seemed very much concerned and worried for fear of this disease.

Did the defendant have reason to believe that the dog was liable to bite human beings? The evidence might be stronger upon this point. We think there is barely sufficient to justify a finding that defendant knew this characteristic of the dog, but, taking it all together, we think it enough.

It is also argued that the verdict was arrived at by the quotient method, and is therefore void. The evidence taken upon the hearing of the motion for a new trial does not sustain this assignment. It is true that the jurors each wrote what he believed the amount of the verdict should be, and that these sums were afterwards added and the average taken; but there is no proof that there was a previous agreement that this should be taken as the amount of recovery; in fact, most of the members of the jury, who were called to the witness-stand and examined orally, denied this, and also testified that after the average had been ascertained the question as to the amount of damages was discussed, and finally this average amount was adopted as a fair recovery. That it is not an unusual method in a jury room to let each juror write the amount of damages which he believes a plaintiff should recover upon a slip of paper, and thus ascertain the average of their views, the writer can state from his own experience, when as a young man he performed a part of his civic duties by serving as a juror in several cases. As long as the jurors do not agree in advance that this average shall be their verdict, and still reserve the right to their individual judgment before the verdict is reached, this method, while not to be commended, is not illegal. *Village of Ponca v. Crawford,* 23 Neb. 662; *Metcalf v. Bockoven,* 62 Neb. 877.

It is claimed that the amount of damages is excessive. From the plaintiff's own testimony it appears that he suffered but slight pecuniary loss. Probably $40 would cover everything expended for medical services, medicine used, and bandages. Loss of earnings was not proved to any great extent. The gravest injury that he seems to have suffered was from worry and nervous strain arising from fear of hydrophobia. There is no doubt that this continued for a long time after the wound had perfectly healed, and caused him considerable distress, both mental and physical. The wounds soon healed, and

the danger from hydrophobia was more apparent than real. There is no proof that the dog was other than a perfectly healthy animal. We believe the damages awarded are excessive under all the circumstances. If plaintiff remits all of the original judgment in excess of $600 within forty days, the judgment of the district court is affirmed; otherwise the judgment is reversed and remanded for further proceedings.

AFFIRMED ON CONDITION.

ROSE, J., not sitting.

HUGH MURPHY CONSTRUCTION COMPANY, APPELLANT, V. HENRY SERCK, APPELLEE.

FILED APRIL 17, 1920. No. 21380.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: NEGLIGENCE OF THIRD PARTY: COMPENSATION: SUBROGATION. An injured employee under article VIII, part II of the workmen's compensation act, is entitled to compensation from his employer for an accident arising out of and in the course of his employment, even though the injury occurs by the negligence of a third party. In such a case, under section 3659, Rev. St. 1913, the employer is subrogated to the rights of the employee against such third person. If the employee settles with the wrongdoer, the employer is entitled to have the amount received applied *pro tanto* in payment of the compensation awarded by the compensation commissioner.

2. ———: ———: ———: ———: ———. A negligent third party cannot, without the consent or concurrence of the employer, by settlement with an injured employee, affect or preclude the right of recovery by the employer for damages sustained by the injured workman to the extent of the compensation awarded.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed as modified.*

William H. Herdman, for appellant.

A. W. Elsasser and *J. C. Kinsler, contra.*

LETTON, J.

This is a proceeding in the nature of an appeal from the decision of the district court and compensation commissioner from an award made against the appellant in a proceeding under the workmen's compensation act. There is no bill of exceptions, and the only question is whether the proper judgment was rendered under the findings of fact. The court found: "That for some time prior to the 11th day of September, 1918, the said Henry Serck was in the employ of said Hugh Murphy Construction Company, and was earning more than $18 a week; that both plaintiff and defendant were operating and working under and governed by the provisions of the workmen's compensation law of the state of Nebraska; that on said 11th day of September, 1918, while the said Henry Serck was driving a truck for the said Hugh Murphy Construction Company, along and upon one of the business streets of the city of Omaha, Nebraska, the Omaha & Council Bluffs Street Railway Company negligently drove one of its said cars against said truck and negligently caused the said Henry Serck to be thrown from said truck and severly injured; the said injury consisted in seriously bruising or breaking his left leg at or near the ankle, and that said injury was one arising out of and in the course of the employment of said Henry Serck by the said Hugh Murphy Company, and resulted in the said Henry Serck being wholly disabled for a period of twenty weeks; that the said Henry Serck is entitled to recover compensation from his employer, the said Hugh Murphy Construction Company, for a period of 20 weeks at the rate of $12 per week.

"The court further finds that by executing to said Omaha & Council Bluffs Street Railway Company the release pleaded by the above-named plaintiff and appellant, Hugh Murphy Construction Company, the defendant and appellee, Henry Serck, did not in any manner give up, release or relinquish his right to compensation,

but that he only gave up, released or relinquished such right as he or his employer for him might have had to recover something by way of damages from said street railway company over and above any amount for which the employer, the above-named plaintiff and appellant, Hugh Murphy Construction Company, should be liable for or pay to its employee, the above-named defendant and appellee, Henry Serck, as compensation for his said injuries in accordance with the terms and provisions of said workmen's compensation law."

It was adjudged that Serck recover compensation at the rate of $12 a week for 20 weeks, or $240.

Section 3651, Rev. St. 1913, provides with respect to parties who have accepted the provisions of part II of the act: "Compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer." For every such injury it is mandatory that compensation be made; but, where a third person has caused the injury, section 3659 provides: "The employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expense of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation."

When the accident happened the employer became liable to the employee for compensation to be paid according to the provisions of the statute. The employer

also was subrogated to the right to recover from the negligent third party the full amount of damages suffered by the injured workman. The amount which the employee was entitled to receive from the employer was in a large degree fixed by statute, but the amount which the employer might in turn recover from the wrongdoer is to be determined either by settlement satisfactory to the three parties concerned or by the ordinary process of litigation in an action for damages. The wrongdoer must take notice of the rights of all, and cannot by a settlement with the injured party increase the burden of the innocent employer. The parties concerned are equal in the eye of the law, and the courts will not suffer one to profit at the expense of either of the others. To allow the workman to settle with the street railway company for an unfair or an inadequate sum would compel the employer to be mulcted to an additional extent, therefore, when the street railway company settled with the injured workman, it took the risk of having to pay additional damages to the employer if the settlement was not fair, adequate and satisfactory. If such a settlement was satisfactory to it, the employer is entitled to deduct from the amount of compensation the money which the injured workman has already received by way of settlement. If, however, the settlement was inadequate or obtained by fraud or mistake, and the employer is compelled to pay a greater sum by way of compensation, the employer still has his remedy by proceeding against the street railway company for any damages suffered by the workman in excess of the amount paid by way of settlement. There is no provision in the Nebraska statute, as in those of some states, requiring the injured employee to elect between claiming compensation under the statute and an action for damages against the negligent third party. The following cases support our conclusion. *Woodward v. Conklin & Son,*

157 N. Y. Supp. 948; *McGarvey v. Independent Oil & Grease Co.*, 156 Wis. 580; *Lester v. Otis Elevator Co.*, 153 N. Y. Supp. 1058.

The judgment of the district court is therefore modified to the extent that the $75 received from the street railway company shall be considered to have been applied in payment of the first instalments of compensation until exhausted, and that the remaining instalments shall be paid at the rate of $12 a week until the full sum of $240 has been paid.

MODIFIED AND AFFIRMED.

ROSE, J., not sitting.

CHARLES LAUB, APPELLEE, V. FURNAS COUNTY ET AL., APPELLANTS.

FILED APRIL 17, 1920. No. 20972.

1 **Constitutional Law:** TAXATION: LEVY BY VALUATION. Section 1, art. IX of the Constitution, which reads as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct," etc.—is not self-executing, but requires appropriate legislation to carry it into effect.

2. **Taxation:** VALUATION OF LIFE INSURANCE POLICIES. The failure of the legislature to provide any method for ascertaining the value of life insurance policies prevents their taxation, although it does provide a method for ascertaining the value of ordinary or tangible property, and also provides special regulations for ascertaining the value of other classes of property which are difficult to value.

3. **Statutes:** CONSTRUCTION. "Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111.

APPEAL from the district court for Furnas county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

John Stevens, for appellants.

Lambe & Butler, contra.

CORNISH, J.

The inquiry is whether or not the right of plaintiff (appellee), never exercised, to demand of the State Life Insurance Company the sum of $6,895, in full settlement of the policy on his life, is "property" or "credit" and, as such, taxable under the laws of the state.

Sections 6335-6337, Rev. St. 1913, provide that the state board of equalization and assessment shall annually prepare a schedule, which should contain a full list of the various forms of personal property liable to assessment. The schedule prepared makes no mention of insurance policies as an item for assessment. It has never been the practice in this state, or elsewhere, so far as we know, for assessing officers to assess insurance policies.

Section 1, art. IX of the Constitution, reads as follows: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct," etc. This provision of the Constitution is not self-executing, but requires appropriate legislation to carry it into effect. The taxing power is legislative, subject only to limitations imposed by the Constitution. Plaintiff's contention is that until he abandons his right to have the amount of his policy paid to his executor, and agrees to accept the sum of $6,895, his policy is of no taxable value.

The legislature has heretofore provided methods for ascertaining the value of various forms of property, but none as to this. Yet, if it was the intention to include insurance policies, the need of such legislation is apparent. Payments made for fraternal or mutual insurance may give to the contract, by reason of increased risk or

lapse of time, a value which it did not possess. A contract of insurance, which provides no means for cash surrender of the policy by the insured, also might be said to have value. A policy which makes amounts payable to one's dependents upon his death creates a vested interest in the person named. How should the value of these various forms of contract be estimated? Insurance companies are not permitted to deduct these liabilities as demands from the total amount of their assessed assets, and, ordinarily, the courts have not permitted his creditors to force upon the insured the exercise of this option for the collection of indebtedness.

We are of opinion that, until the legislature has provided the means for ascertaining the value of such a contract, it is not taxable, if at all. We are also of opinion that the contemporaneous construction of the statute by the officers, who have been called upon to carry it into effect, which has obtained and has never been questioned, is entitled to great respect, and we are led to the conclusion that the legislature never intended to enact a law providing for the taxation of insurance policies. It would appear to have been the policy of the state to encourage insurance, so that, upon one's death, those dependent upon him may be provided for. It is argued with much force that the beneficial interest is theirs, not his, until he shall conclude to exercise his option.

State Board of Tax Commissioners v. Holliday, 150 Ind. 216, 42 L. R. A. 826; *Tally v. Brown*, 146 Ia. 360; *Insurance Co. v. Cappellar*, 38 Ohio St. 560; *Commonwealth v. Wetherbee*, 105 Mass. 149, 160; *Rensenhouse v. Seeley*, 72 Mich. 603, 617.

The judgment of the trial court is

AFFIRMED.